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No. 581

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

W. F. VAHLBERG,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF

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January 26, 1953.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY. PH. FO 5-8750

INDEX AND AUTHORITIES

PAGE

SUBJECT INDEX

Petition for a writ of certiorari to the Criminal Court of Appeals of the State of Oklahoma 1

Opinion Below 1

Order Staying Mandate 36

Jurisdiction 37

Questions Presented 38

1. The preliminary information or complaint upon which the warrant issued was wholly insufficient for the reason that the affiant had no knowledge whatsoever of the facts set forth in the preliminary information or complaint and only verified the same because the County Attorney of Oklahoma County, State of Oklahoma, told him to sign his name to the complaint 38

2. In the trial of the case before the jury, the trial judge took away from the petitioner the right to a trial by jury by instructing the jury that certain exhibits constituted public records to be kept under the laws of the State of Oklahoma, when, in truth and in fact, they were not public records, and this denied the petitioner a right to a trial by jury as guaranteed to him by both the State and Federal Constitution 38

3. The petitioner further shows that he was charged in the preliminary information or complaint with a conspiracy to violate the law and that he was tried in the District Court on a charge of forgery in the second degree upon which he had not had

INDEX CONTINUED PAGE

a preliminary examination and had not waived one; and, therefore, this denied to the petitioner due process of law and violated his rights as guaranteed to him under the Fourteenth Amendment to the Constitution of the United States of America 38

Statement 39

Information in Justice Court 42

Amended Information 45

Specific Errors to Be Urged 51

1. In holding that a verification made without any knowledge of any kind concerning the matter verified is valid and cannot be inquired into 51

2. In holding that the trial court did not invade the province of the jury when the trial court instructed the jury that certain exhibits, namely Exhibits "6" and "7", offered in evidence constituted certain books of account required to be kept under the laws of the State of Oklahoma when this was a disputed question of fact, and should have been determined by the jury 51

3. In holding that the petitioner had been accorded an examining trial when, in truth and in fact, according to the record he had received an examining trial upon a conspiracy charge and aws tried in the District Court upon a charge of foregry in the second degree 51-52

Reasons for Granting the Writ 52

1. The decision of the Criminal Court of Appeals, as set forth in its written opinion, makes an absolute nullity of the Constitution of the State of Oklahoma and the Statutes of the State of Oklahoma

INDEX CONTINUED PAGE

which require that before a warrant can issue there must first be filed "A DULY VERIFIED COMPLAINT" 52

2. Clearly the opinion of the Criminal Court of Appeals is erroneous and takes away from the petitioner his constitutional rights under the Constitution and Laws of the State of Oklahoma to a trial by jury in holding that the trial judge may tell a jury that certain exhibits offered by the State; namely, Exhibits "6" and "7", are proper records required to be kept under the laws of the State of Oklahoma when this was a controverted question of fact to be determined by the jury when, in truth and in fact, one of the exhibits constituted no more than a scratch pad and these are the records which the petitioner was charged with forging or changing 52-53

3. The third reason for granting a writ is that the petitioner believes that clearly he was not granted the equal protection of the Law of Oklahoma in that the Law of Oklahoma and the Constitution of Oklahoma require that no person can be tried for a felony without having first had an examining trial before a Justice of the Peace or an examining magistrate or having waived one on the charge for which he is tried in the trial court 53

Order Extending Time 54

Conclusion 56

Brief in Support of Petition for Writ of Certiorari 57

Statement of the Case 57

Argument and Authorities 63

INDEX CONTINUED PAGE

Proposition I: The "preliminary information" was not verified within the meaning of the law and as required by law and was, therefore, insufficient to authorize the issuance of a warrant or to confer upon the Justice Court 63

Statements of Principles 64-66

United States Constitution 66

Constitution of Oklahoma 67

a. Unconstitutional state statutes and state court decisions giving effect to same must give way and fall before contrary provisions of the Constitutions, state or federal 72

b. There can be no statutory limitations which override the exercise of constitutional rights or impair their efficient assertion. 72

c. Since it is uniformly held that one swearing to an information must do so upon facts within his own knowledge in order to comply with the Constitution of the United States, it can always be shown that he did not possess the requisite capacity and qualification in that he did not actually know the facts and thus that his verification was really upon information and belief and upon hearsay 73

d. Every court must hear and determine constitutional questions which are properly tendered to it 82

e. Where facts are relied on by one alleging unconstitutional deprivation of rights, a hearing must be held and the claimant given an opportunity to prove the unconstitutional action or deprivation 84

f. A litigant is required to assert his constitutional rights at the first opportunity and is entitled to have them ruled upon at the first opportunity 84

INDEX CONTINUED PAGE

g. A code of procedure which does not contain an adequate procedure for the protection of constitutional rights is not exclusive, and opportunity to assert such rights exists even in the absence of a provision in the code and notwithstanding a contrary provision in the code 85

Proposition II: The trial court invaded the province of the jury 88

Proposition III: The petitioner was denied a preliminary hearing 95

Conclusion 96

Authorities Cited

Cases:

Bennett v. State, 33 Okla. Cr. 244, 243 Pac. 531 74
Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. 524 ..... 68, 72
Byres v. United States, 273 U. S. 28, 71 L. Ed. 520, 47 Sup. Ct. 248 73

Cook County v. Chicago Industrial School (Ill.), 18 U. S. 183 84
Corn v. Rankin, 158 Pa. Super. 1, 43 A.2d 435 93

Daniels v. State, 55 Okla. Cr. 298, 29 P.2d 997 85
DeGraff v. State of Oklahoma, 2 Okla. Cr. 519, 103 Pac. 538 75-81
Downing, Protest of, 164 Okla. 181, 23 P.2d 173 83

Emch v. Guymon, 75 Okla. Cr. 1, 127 P.2d 855 72
Evans v. Willis, 22 Okla. 310, 97 Pac. 1047 74

Franklin v. South Carolina (U. S.), 218 U. S. 161, 54 L. Ed. 980 84

Gore v. State, 24 Okla. Cr. 394, 218 Pac. 545 74
Gray v. State, 122 Pac. 254 92

INDEX CONTINUED PAGE

Greene v. Louisville & Interurban Ry. Co., 244 U. S. 499, 508, 512, et seq., 61 L. Ed. 1280, 1285, 1287, 37 Sup. Ct. 673, Ann. Case. 1917E, 88 83

Hadacheck v. Sabastian (U. S.), 239 U. S. 394, 60 L. Ed. 348 84

Hughes v. State, 83 Okla. Cr. 23, 172 P.2d 439 85

Jones v. Securities Exchange Commission, 298 U. S. 1, 80 L. Ed. 1015, 56 Sup. Ct. 654 72

Kay County Excise Board v. Davis (Okla.), 103 P.2d 939 69

K. & L. Oil Co. v. Oklahoma City (D. C., Okla.), 14 Fed. Supp. 492 72

Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. Ed. 1102 82

Leathers, Ex parte, 66 Okla. Cr. 172, 90 P.2d 452 69

Lohmeyer v. St. Louis Cordage Co., 113 S. W. 1108 84

Long, Ex parte, 26 Okla. Cr. 259, 223 Pac. 710 74

Marbe v. State, 195 Miss. 386, 15 So.2d 693 92-93

Marbury v. Madison, 1 Cranch. (U. S.) 137, 2 L. Ed. 60 72

Martin v. Texas (U. S.), 200 U. S. 316, 50 L. Ed. 497 84

McKeever Drilling Co. v. Egbert, 170 Okla. 259, 40 P.2d 34 69

Milinski et al. v. People of the State of New York, 324 U. S. 401 93-94

Morgan v. U. S., 298 U. S. 468, 80 L. Ed. 1288 85

Murray, Ex parte (Nev.), 157 Pac. 647 81

Owens, Ex parte, 37 Okla. Cr. 118, 258 Pac. 758 67

Pacific Live Stock Co. v. Ellison Ranching Co., 46 Nev. 351, 213 Pac. 700 83

Parker v. Illinois, 333 U. S. 571, 92 L. Ed. 86 87

People v. Kinowaki, 39 Cal. App.2d 374, 103 P.2d 203 92

Pierre v. Louisiana (U. S.), 306 U. S. 354 84

INDEX CONTINUED PAGE

Potter v. State, 228 P.2d 204 91

Riccomini v. United States, 69 F.2d 480 83
Rochin v. People of California, 342 U. S. 165 94

Salter v. State, 2 Okla. Cr. 464, 102 Pac. 719 85-87
Smith v. Cahoon, 283 U. S. 553, 564, 75 L. Ed. 1264, 1272, 51 Sup. Ct. 582 83
Stanley v. State, 142 Tex. Cr. Rep. 495, 154 S.W.2d 856 93
State v. Barnett, 60 Okla. Cr. 355, 380, 69 P.2d 77, 88 ..... 68, 72
State v. Bayless, 247 S.W.2d 114 92
State v. Brown, 24 Okla. 433, 103 Pac. 762 69
State v. Brown, 8 Okla. Cr. 40, 126 Pac. 245 69
State v. Cohen, 100 S.W.2d 544 93
State v. Frisbie, 8 Okla. Cr. 406, 127 Pac. 1091 85
State v. Peterson (Wyo.), 194 Pac. 342, quotes with approval from the opinion of the Supreme Court of Kansas in State v. Gleason, 32 Kan. 245 74
State v. Thornhill, 188 La. 762, 178 So. 343 92
Sullivan, Ex parte, 10 Okla. Cr. 465, 138 Pac. 815 69

Taylor v. State, 55 Ariz. 29, 97 P.2d 927 92
Thomas v. Reid, 142 Okla. 38, 285 Pac. 92 72
Trapp v. Cook Construction Co., 24 Okla. Cr. 850, 105 Pac. 667 72
Tulley, Ex parte, 40 Okla. Cr. 398, 112 Pac. 36 74

U. S. v. Eason Oil Co. (D. C., Okla.), 8 Fed. Supp. 365 72
United States v. Neuendorf, 8 Fed. Supp. 403 83
United States v. Tureaud (D. C., L. A.), 20 Fed. 621 (cited with approval and followed by the Criminal Court of Appeals in Salter v. State, 102 Pac. 719 73-74

Vindicator Consolidated Gold Mining Co. v. Firstbrook (Colo.), 86 Pac. 313 84

Walrod, Ex parte, 73 Okla. Cr. 299, 120 P.2d 783 72

INDEX CONTINUED PAGE

STATUTES:

Title 21 O. S. 1951, Section 503 70
Title 22, O. S. A. Article 171 41
Title 22, O. S. A., Sections 251-264 50
Title 28, U. S. C., Sec. 1257(3) and Sec. 2101(d) 37

MISCELLANEOUS:

Constitution of Oklahoma:

Article 1, Section 1 68
Article II, Section 1 68
Article II, Section 2 68
Article II, Section 6 68
Article II, Section 7 69
Article II, Section 17 ..... 41, 69
Article 2, Section 19 88
Article 2, Section 20 ..... 48, 88-89
Article II, Section 30 ..... 40, 69-70
Article II, Section 33 70
Preamble 67

Constitution of the United States:

Section 2, Article IV 66
Section 2, Article VI 66
Fourth Amendment 66
Fifth Amendment 67
Ninth Amendment 67
Fourteenth Amendment, Section 1 67

How. St. Trials, Vol. 19, p. 1030 70

No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1952

W. F. VAHLBERG,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF

PETITION

Comes now the above-named petitioner, W. F. Vahlberg, and prays that a writ of certiorari issue to review the opinion of the Criminal Court of Appeals of the State of Oklahoma rendered by said Court in the above-entitled case on the 22nd day of October, 1952.

OPINION BELOW

The said opinion of the Criminal Court of Appeals of the State of Oklahoma is in words and figures as follows, to-wit:

"IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

"W. F. Vahlberg	)	
"Plaintiff in Error	)	
vs.	)	No. A-11628
"The State of Oklahoma	)	
"Defendant in Error	)	

"FILED
"In Criminal Court of Appeals
of Oklahoma
"October 22, 1952
"Andy Payne,
Clerk

"Syllabus

"1. In prosecution for forgery against county treasurer under provisions of Title 21, O. S. 1951, Sec. 1586 in order to sustain conviction state must show: 1. A false entry in book of account of treasurer. 2. That false entry affected interest of the county or an individual. 3. Such entry was made with intent to defraud.

"2. Proof of general intent to defraud is sufficient for conviction, even though no actual person is defrauded. The intent is always a question for the jury, and may be inferred by them from what the accused does and says and from all the facts and circumstances surrounding the alleged forgery.

"3. Technical rules of pleading need not be adhered to in the preliminary complaint to the same extent as may be required in the information in the trial court.

"4. Where one is charged in a justice of the peace court by preliminary complaint and an examination trial has been had and the defendant held to the district court, the county attorney is authorized to file an information in the district court upon any reasonable

charge which the facts at the preliminary examination justify, and if a preliminary is waived, he must file an information in substantial compliance with the complaint filed before the justice of the peace.

"5. In filing an information in the district court after a preliminary examination had been given the accused, the county attorney may not substitute one offense for another, but the information may vary in charging circumstances, methods, or means, or in formal and non essential matters of the crime.

"6. The administration of an oath by an officer is a ministerial and not a judicial act, and the legislature was empowered to create office of clerk of justice of the peace in cities of the first class and vest such clerks with authority to administer oaths. 39 O. S. 1951, Secs. 21 to 24, inclusive.

"7. Court did not err in refusing to quash complaint filed with justice of the peace upon ground that oath was administered by clerk of the justice of the peace court.

"8. Where a preliminary complaint in legal form is verified as true in positive terms, such verification constitutes a sufficient showing of probable cause to authorize the issuance of a warrant of arrest and to put the defendant on trial, and on a motion to quash the warrant no issue can be made as to the knowledge or want of knowledge of the facts charged on the part of the person who verified the complaint; nor can the complaint be set aside on the ground that the person who verified it had no personal knowledge of the facts therein stated.

"9. An order sustaining a challenge to grand jury panel which returned indictment against the accused and dismissing indictment constituted no bar to a further prosecution by information against the accused for the same offense.

"10. Where facts are conflicting, it is for jury to determine if witness is accomplice; but where acts and conduct of witness are admitted, it then becomes a question of law for the court to say whether such acts and conduct make the witness an accomplice.

"11. Where counsel for accused are not satisfied with the instructions which are given it is their duty to prepare such instruction or instructions they think should be given, in writing, submit them to the trial judge and request they be given to the jury. If they fail to do this, a conviction will not be reversed unless the court is of the opinion in the light of the entire record and instructions of the court, that by failure of the trial court to instruct the jury upon some material question of law, the defendant has been deprived of a substantial right.

"12. Generally the interpretation or construction and the meaning and legal effect of written instruments are matters of law for the determination of the court.

"13. Where the interpretation to be given to a written document depends upon collateral and extrinsic circumstances it then becomes a question for the determination of the jury to be aided by proper instructions from the court.

"14. Trial court did not err in instructing jury that a 'return of tax sale' and a 'record of sales' identified by the county treasurer as being records kept permanently in his office were 'books of account' within the meaning of statute under which prosecution was instituted (21 O. S. 1941, Sec. 1586).

"15. Sentence of five years imprisonment in the penitentiary assessed eighty-five year old individual where jury left punishment to the court was excessive where evidence disclosed that alleged forgery caused no loss of property to any individual, and prosecution for

same offense could have been had under a misdemeanor statute, and giving full consideration to the age and frailty of the accused and all other facts and circumstances in the case.

"Appeal From the District Court of Oklahoma County, Oklahoma, Hon. Baker H. Melone, Judge

"Defendant was convicted of forgery in the second degree, and sentenced by the court to serve a term of five years imprisonment in the state penitentiary. Modified and Affirmed.

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"Amici Curiae

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"Oklahoma City, Oklahoma
"Attorneys for Defendant in Error.

"JONES, Judge

"The defendant, W. F. Vahlberg, was originally charged with two other individuals in an indictment returned and filed by a grand jury of Oklahoma County, charging them with the crime of forgery in the second degree. Subsequently the district court after a hearing sustained a motion to quash the indictment and the defendant and the other individuals were discharged. Thereafter the county attorney commenced a prosecution against the same three individuals by filing a complaint before a committing

magistrate in Oklahoma County. After a lengthy preliminary examination one of the accused was discharged but the defendant and the other accused individual were ordered held to await trial in the district court. Thereafter the district court of Oklahoma County overruled a motion to quash the information so far as the defendant Vahlberg was concerned, but sustained the motion as to the other individual and he was discharged. The county attorney then filed an amended information charging the defendant Vahlberg alone with the crime of forgery in the second degree by allegedly violating the provisions of Tit. 21, O. S. 1941, Sec. 1586; a trial was had, the jury returned a verdict of guilty but left the punishment to be fixed by the trial court. Thereafter the defendant was sentenced to serve five years imprisonment in the state penitentiary, and he has appealed.

"The printed record consists of 2700 pages. The following assignments of error are presented: 1. The evidence was wholly insufficient to sustain the verdict. 2. The preliminary information does not allege a crime. 3. The preliminary information was not verified within the meaning of the law. 4. The Justice of the Peace was without jurisdiction for the reason that an order had not been made by the district court directing or authorizing further prosecution after the indictment had been dismissed. 5. The information wholly fails to charge a crime. 6. The court erred in its instructions. 7. There was a fatal variance between the allegations of the preliminary complaint and the information.

"W. T. (Bill) Hale testified he had been county treasurer of Oklahoma County since July 5, 1949; the record of all tax sales by the county treasurer are executed in triplicate and are records required to be kept by law. He produced the work sheets in connection with the November, 1946 tax sale which showed the Northeast Quarter (NE¼) of Section Thirty-one

(31), Township Thirteen (13) North, Range Three (3) West, was sold to one 'Ted Smith'. The permanent sales book for this sale also showed the tract sold to 'Ted Smith' and that tax certificate Number 5186 was issued to 'Ted Smith'. The county treasurer's books disclosed that on January 2, 1947, Ted Smith paid treasurer's fees totaling $49.75 on 199 tax certificates issued to him. The county treasurer makes a charge of twenty-five cents for the issuance of a tax certificate and the $49.75 paid by Ted Smith on January 2, 1947 was the treasurer's fee for the issuance of tax certificates to him. The November, 1946 delinquent tax sale was for unpaid 1945 real estate taxes and according to the tax rolls the Northeast Quarter (NE¼) of Section Thirty-one (31) Thirteen (13) Three (3) was owned by Ida F. Hasley.

"Ida Hasley testified that she and G. A. Nichols were joint owners of the Northeast Quarter (NE¼) of Section Thirty-one (31), Township Thirteen (13) North, Range Three (3) West. She had had difficulty getting her co-owner to help her pay the taxes so she had not paid the 1945 taxes and they were included in the delinquent tax sale held on November 4, 1946. She attended this sale which was presided over by the defendant Vahlberg in his office. When the defendant called the Northeast Quarter (NE¼) of Section Thirty-one (31), Thirteen (13), Three (3), she attempted to place a bid in the name of J. A. Burt, Jr., who held a mortgage on the property. The witness testified, 'Vahlberg then said, "Well that is paid". Vahlberg looked at Mr. Reynolds and Mr. Reynolds nodded in the affirmative and said, "That is paid".' She left the treasurer's office thinking her co-owner Nichols had paid the taxes. She was later informed by J. A. Burt, Jr. that a tax certificate had been issued to one 'Ted Smith'. She went to the county treasurer's office on March 14, 1947 and talked to defendant Vahl-

berg. The following conversation occurred at that time:

Mrs. Hasley: 'Mr. Vahlberg, it is a positive fact that there is an outstanding tax certificate in the name of Ted Smith, and you have told me all along that those taxes were paid.' 'And I said, "Now, unless you cancel that certificate and issue one to me, as I bid on it, there is nothing else for me to do but to go to the County Attorney's Office," and he said, "You are trying to steal everything." I said, "You are a liar, Mr. Vahlberg." And he got nervous and twisted his hands and he said, "If you were not a woman, I would throw you out of here on your fanny".'

She went to the man who was county attorney at that time and made a report but nothing was done. She then gave her personal check to J. A. Burt, Jr. for $155.84 and he obtained a cashier's check and later procured an assignment of the tax certificate covering her property. There was no one at the tax sale by the name of Ted Smith which bid in her property and the record in the county treasurer's office showing such sale was false. Later she sold her interest in the property to the American First Trust Company for eighty thousand dollars.

"A. C. (Jack) Reynolds was chief deputy county treasurer from July, 1945 to February, 1948; tabulated the November, 1946 tax sale. On Saturday befor the sale on Monday he had a conversation with Vahlberg in the treasurer's office after the office was closed. Vahlberg said: 'Ted Smith wants to reserve some property'; and gave him a list of property designated to be reserved, on which the defendant Vahlberg had place a check mark 'pd' or 'ck' after the description of the property which Vahlberg said reserve for Ted Smith. Vahlberg had placed a check

mark opposite the Northeast Quarter (NE¼) of Section Thirty-One (31), Township Thirteen (13) North, Range Three (3) West, the Ida Hasley property. Vahlberg informed him that 'when I came to any of this property which he had checked when he was calling the sale' for the witness to say, 'That is paid'. The witness wrote the name of Ted Smith on the permanent sales record of the county treasurer's office and on the work sheet of the delinquent tax sale at the direction of Vahlberg. The Hasley property was not sold to any one at the November, 1946 tax sale.

"William C. Sherer, present cashier in county treasurer's office and has been in treasurer's office since 1933. State's exhibit No. 10 was work sheet or tape out of cashier's register, showing cash receipts of January 2, 1947. Item No. 24743 shows receipt of $152.43 to pay 1945 taxes in 1946 sale. (This covered the Hasley-Nichols property). Item No. 24744 shows payment of $3418.50 plus treasurer's fees in the sum of $49.75 for 199 tax certificates, which showed a total payment of $3,468.25 paid by Ted Smith.

"Glenn C. Skinner, public accountant, notary public. On March 14, 1947 he notarized an assignment of tax certificate No. 5186 purportedly signed by Ted Smith. No person named Ted Smith appeared before him and he had no independent recollection as to whom brought the certificate to him for acknowledgment.

"Theron Elder, Vice President, First National Bank and Trust Company, W. F. Vahlberg had an account at his bank on January 2, 1947. A recordak picture of defendant's bank statement for the month of January, 1947 was identified and admitted in evidence. On January 3, 1947 there was a withdrawal by check of the sum of $3468.25 from defendant's account. The county treasurer also kept an account at his bank. The county treasurer's deposits on January 3, 1947

totaled $37,369.88, and included the check on the defendant Vahlberg in the amount of $3468.25.

"J. A. Burt, Jr. had a mortgage on the Ida Hasley one-half interest in the Northeast Quarter (NE¼) Thirty-One (31), Thirteen (13), Three (3), which was in effect in November, 1946. On February 4, 1947 he checked the records in the county treasurer's office to see whether the taxes had been paid on this property and found a tax certificate had been issued to a Ted Smith; talked to county treasurer Vahlberg and told him that he wanted the certificate assigned to him and Vahlberg replied that he would see about it for him. He notified Ida Hasley and she gave him her check for a sufficient amount to pay for the assignment of the tax certificate. Later Vahlberg called him at the witness's office and told him the tax certificate had been assigned and was ready at his office. He went to Vahlberg's office and Vahlberg handed him the certificate which showed the assignment executed by Ted Smith on the certificate. He never saw and does not know a Ted Smith.

"All of the various exhibits which had been identified and which chiefly constituted records of the county treasurer's office tracing in detail the transactions in connection with the November, 1946 sale were admitted in evidence. Whereupon the state rested its case.

"W. F. Vahlberg testified that he was county treasurer of Oklahoma County from July, 1933 to July, 1949, and that he was now eighty-four years of age. Jack Reynolds was his chief deputy but he had discharged him in March, 1948, because of general inefficiency. He never told Reynolds to mark off any properties and hold them out of the November, 1946 tax sale. Vahlberg conducted the November, 1946 sale from a newspaper advertisement of the sale and

Reynolds kept an account of the sale. He remembered Ida Hasley attending the sale. When her property was called for sale she said, 'I want the certificate for Burt', and Vahlberg told her that she couldn't do that as it was her own property and for her to go pay her taxes. His name is not Ted Smith and he never used the name, does not know Ted Smith and never purchased any tax certificate in the name of Ted Smith. At the time of the November, 1946 sale he was becoming quite advanced in age and he relied solely upon his deputies for the proper handling of the tax sale. The work in connection with the sales was handled by his deputies and he never saw the certificate which was issued to Ted Smith. On December 31, 1946, he did write a check in the sum of $3468.25, which check was the one deposited to the account of the county treasurer on January 3, 1947. He put this up as a loan to the county to cover the cost of certain certificates which had been sold and for which payment had not been made, with the thought in his mind that some settlement might later be made and he would get his money back; did not know in whose name the certificates were issued. All of the property owners later redeemed their property and he did not receive a tax deed on any of the tracts. Maude Cowle delivered the tax certificate to J. A. Burt, Jr. conveying the Hasley property, and he had nothing to do with it.

"Maude Cowle was called by the state as a rebuttal witness, and testified that she was a clerk in the county treasurer's office. She never delivered the tax certificate involving the Hasley property, which was purportedly signed by one Ted Smith, to J. A. Burt, Jr.

"This prosecution was instituted under the provision of Title 21, O. S. 1951, Sec. 1586, which provides:

" 'Every person who, with intent to defraud, makes any false entry or falsely alters any entry made in

any book of accounts kept in the office of the Auditor of this State or in the office of the Treasurer of this State, or of any county treasurer, by which any demand or obligation, claim, right or interest either against or in favor of the people of this State, or any county or town, or any individual, is or purports to be discharged, diminished, increased, created, or in any manner affected, is guilty of forgery in the second decree.'

"In order to sustain the conviction it was incumbent upon the state to prove the following:

"(1) A false entry in any book of account of the county treasurer; (2) by which false entry any interest of the county or any individual; (3) is in any manner affected; (4) with intent to defraud.

"If the testimony of the witness Reynolds was believed by the jury it was shown that at the direction of the defendant he falsely entered the name of Ted Smith on the work sheet of the county treasurer's office in connection with the November, 1946 tax sale and on the permanent sales record. These were books of accounts and records permanently kept in the office of the county treasurer and falsely showed that one Ted Smith had placed a bid and secured a tax certificate on the 'NE-31-13-3'. This false entry affected the right and interest of both the county of Oklahoma and the individuals, Ida F. Hasley and G. A. Nichols. The interest of these parties was affected in this way: If no bid had been placed on the property then the property would have been sold to the county. At the end of two years the property would have been advertised for sale at a resale and if no purchaser had appeared the county would have become the owner of the property. Tit. 68, O. S. 1951, Sec. 432d. The interest of Hasley and Nichols was affected by the false entry because it erroneously

caused a tax certificate to be issued against their property which might result in the later issuance of a tax deed to the holder of the tax certificate in case of neglect of the owners to redeem the property by the payment of taxes. At any event, under the record the false entry caused the owners to have to pay an additional accumulation of interest and fees which they would not have had to have paid if the false entry had not been made and a false report that the taxes were paid given to the witness Hasley at the time of the sale. The county was actually defrauded of the sum of $3.41 which represented the additional penalty paid by Mrs. Hasley above what she could have redeemed the property at the time of the sale. There was no purchaser at the sale and the property should have been bid off in the name of the county. 68 O. S. 1941, Sec. 391.

"The intent to defraud must be determined by a consideration of all the evidence connected with the transaction. The undercover manner in which the county treasurer advised his chief deputy to make the false entry and to advise the public in case of an attempted bid on the property that 'that is paid', together with the apparent use by the defendant of a wholly anonymous name to conceal his transactions from the public gaze, are all strong circumstances to be considered by the jury in connection with all the other facts and circumstances of the case as bearing on the intent to defraud. The fact that no one actually lost their property is not the test because the actions of the defendant indicated the apparent intent upon his part under cloak of the authority given to him as county treasurer to secure the tax certificates in a secretive and fraudulent manner. In *Snider* v. *State*, 71 Okla. Cr. 98, 108 P.2d 552, it is held:

" 'Proof of general intent to defraud is sufficient for conviction, even though no actual person is defrauded.

The intent is always a question for the jury, and may be inferred by them from what the accused does and says and from all the facts and circumstances involved in the transaction.'

"The trial court did not err in submitting the case to the jury for its determination of the issues, and in overruling the demurrer of the defendant to the evidence of the state.

"The second, fifth and seventh assignments of error may be consolidated for the purpose of discussion. These assignments of error presented these propositions: The preliminary complaint does not allege a crime; the information filed in the district court fails to charge a crime; there was a fatal variance between the allegations of the preliminary complaint and the information.

"The preliminary complaint in substance charged that on November 4, 1946 Vahlberg and two other individuals were associated together in buying and selling tax certificates and tax titles and were operating under the assumed name of Ted Smith; that Vahlberg was the county treasurer of Oklahoma County; that Hasley and Nichols were the co-owners of certain property on which there were due 1945 taxes in the sum of $155.74; that at the November, 1946 tax sale Hasley appeared to bid on said property but when the property was cried for sale she attempted to bid in the sale in the name of J. A. Burt, Jr. for the amount of taxes due and that Vahlberg, who was conducting the sale, told her that the taxes had already been paid on the property, when in truth and in fact the taxes had not been paid; and that the name of Tex Smith was endorsed on the 1946 permanent sales record of the county treasurer showing that Ted Smith had purchased the tax certificate on the above described property; that thereafter Ted Smith assigned said

certificate to J. A. Burt, Jr.; that J. A. Burt, Jr. surrendered said certificate; that the record reciting Ted Smith purchased said property at public sale was a false entry made with intent to cheat and defraud Ida Hasley, all of which constituted forgery under provisions of Title 21, O. S. 1941, Sec. 1586 contrary to the form of the statutes etc.

"Some of the language in the preliminary complaint is surplusage and does not add to the legal sufficiency of the complaint. However there are sufficient statements to allege the making of a false entry on a book of account of the Oklahoma County Treasurer by the named defendants, and the further allegation of the violation of a specific statute.

"This court often repeats that technical rules of pleading are not looked upon with favor by our court and particularly does not apply to preliminary complaints.

"In the case of *Mason* v. *State*, 23 Okla. Cr. 111, 212 Pac. 1028 this court held:

" 'Technical rules of pleading need not be adhered to in the preliminary complaint to the same extent as may be required in the information in the trial court.'

"It should be borne in mind that the amended information upon which the defendant Vahlberg was tried was filed after one of his alleged co-conspirators was discharged in the Justice of the Peace Court, and the other named in the original information filed in the district court was discharged by the trial court after a hearing on a Motion to Quash the Information. That left only the defendant W. F. Vahlberg to be tried. The county attorney then filed the amended information in which the names of the co-conspirators were eliminated. The amended information in substance alleged that the defendant W. F. Vahlberg committed the crime of forgery in the second degree by

violating the provisions of 21 O. S. 1941, Sec. 1586, in that while he was holding office as county treasurer of Oklahoma County he did cause, procure, and direct a false entry to be made in a certain book of account, to-wit: The November, 1946 tax sale record in that the name Ted Smith was listed as the purchaser at a tax sale had on said date of certain described property owned by Ida Hasley and G. A. Nichols; that the entry by said defendant of the name Ted Smith was false and fictitious, the said property not having been sold to Ted Smith at said sale as therein represented, all of which the defendant well knew, and said entry was one which affected or purported to affect the interests of Hasley, Nichols, and Oklahoma County in said property and was made with the intent to cheat and defraud the said owners of their property etc.

"Analyzing this amended information it states the following:

1. Defendant was county treasurer.
2. As such treasurer he caused to be made a false entry in a book of account of the treasurer.
3. Said false entry affected the interests of Oklahoma County, Hasley and Nichols.
4. The false entry was made with intent to cheat and defraud.

The information thus sufficiently complies with the law in that it charges the offense alleged to have been committed in the language of the statute and with such certainty that a person of ordinary understanding was bound to know the nature of the offense which he was alleged to have committed and was thus enabled to prepare his defense to said charge. *Handley* v. *State*, 69 Okla. Cr. 321, 102 P.2d 947; *Marks* v. *State*, 69 Okla. Cr. 330, 102 P.2d 955.

"It is true that the amended information contained language not set forth in the original information that was filed nor in the preliminary complaint. However the law permits amendments in either form or substance to be made. 22 O. S. 1941, Sec. 304. In determining whether there was a variance between the allegations of the preliminary complaint and the amended information upon which the accused was tried it should be borne in mind that the state introduced a large amount of evidence at the preliminary examination. In the transcript filed in the district court, duly certified by the Justice of the Peace, appears this order:

" 'Court finds evidence insufficient to bind defendant W. C. Bonney, over to district court. Defendant Bonney released. Court finds evidence sufficient to bind W. F. Valhberg and Dewayne Hayes over to district court. Bonds $1000.00 each. Defendants to remain free on bonds made in Justice of the Peace Court until arraignment in district court. Signed—Willis R. Stark.'

"In the case of *Potts* v. *State*, 72 Okla. Cr. 91, 113 P.2d 839, the rule of law followed by this court in determining whether there was a variance between the information and the preliminary complaint was set forth as follows:

" 'Where one is charged in a justice of the peace court by preliminary complaint and an examining trial has been had and the defendant held to the district court, the county attorney is authorized to file an information in the district court upon any reasonable charge which the facts at the preliminary examination justify, and if a preliminary is waived, he must file an information in substantial compliance with the complant filed before the justice of the peace.'

"*Rickman* v. *State*, 70 Okla. Cr. 355, 106 P.2d; *Little* v. *State*, 21 Okla. Cr. 1, 204 Pac. 305; *Wade* v. *State*, 18 Okla. Cr. 592, 197 Pac. 180.

"In *Sweden* v. *State*, 83 Okla. Cr. 1, 172 P.2d 432, this court held that a variance between allegations of a preliminary complaint and information is not material unless it misleads accused in preparing his defense or exposes him to double jeopardy.

"In *Agent* v. *State*, 18 Okla. Cr. 281, 194 Pac. 233, this court held:

"'* * * this court will presume, in the absence of an affirmative showing to the contrary, that the information upon which the case is tried was supported by the facts disclosed by the evidence of the state at the preliminary hearing.'

"In this connection we note that the transcript of the evidence taken before the committing magistrate, which was included in the record filed with this court on appeal, not only failed to show that the facts disclosed by the evidence at the preliminary examination would not support the information but they affimatively disclose abundant facts to support the information which was filed. Furthermore in *Lewis* v. *State*, 39 Okla. Cr. 119, 263 Pac. 473, this court held that in filing an information in the district court after a preliminary examination had been given the accused, the county attorney may not substitute one offense for another, but the information may vary in charging circumstances, methods, or means, or in formal and non essential matters of the crime.

"We now come to the proposition that the preliminary complaint was not verified within the meaning of the law and was therefore insufficient to confer jurisdiction upon the Justice of the Peace Court. This proposition is presented under two divisions: 1. The verification was made before Mildred S. Boyer, Clerk for the Justice of the Peace, and she had no authority to administer the oath. 2. Sam Oliver who attempted to

verify the complaint had no personal knowledge of the facts and the complaint was therefore a nullity.

"In *Caffee* v. *State*, 11 Okla. Cr. 263, 145 Pac. 499, the information was verified before a clerk of the court. Counsel for the accused filed a motion to quash the information on the ground that information in misdemeanor cases must be sworn to before a magistrate. This court sustained the legality of the verification and held that under the statutes clerks of the district, superior and county courts were authorized to administer oaths and that *the administration of an oath by an officer is a ministerial, and not a judicial act.*

"The Constitution of Oklahoma, Article 2, Sec. 17, provides for the prosecution of persons by indictment or by information and further provides that no person shall be prosecuted for a felony by information without having had or waived a preliminary examination. However the procedure in connection with the preliminary examination is controlled by statute where the same does not conflict with this constitutional provision.

"22 O. S. 1951, Sec. 171 provides:

" 'When a complaint, verified by oath or affirmation, is laid before a magistrate, of the commission of a public offense, he must, if satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, issue a warrant of arrest.'

"Counsel for the accused cite and rely upon the cases of *Ex parte Owen*, 10 Okla. Cr. 285, 136 Pac. 197, and *Bowes* v. *State*, 7 Okla. Cr. 317, 126 Pac. 580, to sustain their position. *Ex parte Owen, supra*, is clearly not in point as it was a habeas corpus case involving the extradiction of the petitioner and the affidavit in support of the complaint was sworn to upon information and belief and was not in positive terms.

In *Bowes* v. *State, supra,* this court held that in 1911, at the time the prosecution was instituted against Bowes, there was no statutory procedure pertaining to the verification of an information charging a misdemeanor and that therefore it was governed by the common law and at common law such oath was taken before a magistrate. Subsequent to the rendition of both the Bowes and Owen opinions, in 1915, an act was passed by the Oklahoma Legislature creating the office of Clerk of the Justice of the Peace in cities of the first class, and granting them power to administer oaths to the same extent as the justice could administer oaths. These statutes provide:

" 'There is hereby created the office of the clerk of the Court of Justice of the Peace in all cities of the first class of this State, and each justice of the peace in such cities of the first class have the right to appoint a clerk for his said court, and the appointee of such justice shall hold such position during the pleasure of the Justice, but such clerk shall receive no compensation from the State or the county, but shall receive such compensation as shall be agreed upon between the appointee and the justice to be paid by the justice out of fees earned by him.' 39 O. S. 1951, Sec. 21.

" 'Said clerk shall have the power to administer oaths and shall have power to issue processes of all kinds and approve bonds in the same manner and to the same extent as the justice himself has now, or shall hereafter have.' 39 O. S. 1951, Sec. 22.

" 'All actions and proceedings over which a justice of the peace has jurisdiction may be filed with said clerk with the same effect as if filed with the justice himself.' 39 O. S. 1951, Sec. 23.

" 'The appointment of said clerk by the justice of the peace shall be in writing, signed by him and shall be filed with the County Clerk, and said clerk shall

take and subscribe to the same oath of office as all other public officials are required to take and subscribe to, and said oath of office shall be filed in the office of the County Clerk, and said clerk shall execute a bond in the sum of five hundred dollars ($500.00) with one or more sufficient sureties, to be approved by the Board of County Commissioners, and which bond shall be for the faithful performance and discharge of duties of clerk and any one that may be injured by any of the official acts and conduct of said clerk may bring an action on said bond in his or her own name.' 39 O. S. 1951, Sec. 24.

"These acts of the legislature have been brought forward and re-adopted as a part of the code of laws of Oklahoma today. (39 O. S. 1951, Secs. 21 to 24, inclusive, *supra.*) There is nothing so far as we can ascertain in these provisions of law which conflict with any section of our constitution.

"Under the second section of this proposition presented by the accused it is contended that Sam C. Oliver, who verified the preliminary complaint, had no personal knowledged of the facts stated in the complaint but only verified the same because he was told to do so by the county attorney. At the time the motion to quash the preliminary complaint was presented and later before the district court counsel for the defendant offered to show that Sam Oliver was an evidence man in the office of the county attorney and had no personal knowledge of the facts stated in the complaint, but on each occasion an objection to the offer of proof was sustained and the motion to quash was overruled. The brief of *amici curiae* is devoted exclusively to this proposition. Although much argument is devoted in the brief of defendant to the proposition that the failure of the court to hear evidence on their motion to quash was a denial of federal and state constitutional rights this court is unable to

agree with their contention. The position of counsel for defendant can best be summarized by a quotation from their brief in which they state:

" 'If a County Attorney can direct one of his lay employees, such as a stenographer, a secretary, a detective, a police officer, or an evidence man, to go sign affidavits such as this to bring about the arrest of a citizen upon a felony charge such as this, when he knew, and the employee knew that the affidavit was to be completely false in stating facts upon positive knowledge, no citizen's life or liberty or happiness would be secure for one instant. It matters not, in this regard, that at some future stage of the proceeding the accused person shall have an opportunity for exoneration. He is entitled to be protected in the meantime (1) from the false charge, (2) from the illegal arrest and deprivation of liberty, (3) from the hazards of requirement of bail, (4) from the expense and vexation of defending himself against the illegal charge and arrest, and (5) from a possible miscarriage of justice in the end.'

"This is not the first case in which the question thus raised has been presented before this court. In discussing this proposition it should be borne in mind that the verification here involved is in positive terms and is not on information and belief. In the early case of *Moss* v. *State*, 4 Okla. Cr. 247, 111 Pac. 950, the information was verified in positive form by the affidavit of the enforcement officer in the office of the county attorney. A motion to quash the information was filed on the ground that the person who verified the information had no personal knowledge of the facts charged, which raised the identical question here presented. Judge D. A. Richardson, one of the most able men who ever sat on this court, wrote a lengthy opinion discussing this proposition wherein he stated:

" 'We think there was no error in the court's ruling. An information which is not verified at all, or which on its face shows that it is verified only on information and belief, should be quashed or set aside on a timely motion for that purpose, for the reason that such verification constitutes no sufficient showing of probable cause. But where the *information is verified in positive terms as true, it constitutes a showing of probable cause, even though it may subsequently develop that the affiant had no personal knowledge of the facts alleged. Such verification makes a prima facie showing, which is all that is required; and on a motion to quash no issue can be made as to the knowledge or want of knowledge of the person who verified the information.* The verification supports the information as the testimony taken before the grand jury supports an indictment. The want of a verification or a verification insufficient on its face will justify the quashing of the information on a seasonable motion, just as a showing that an indictment was found and returned upon no testimony or upon wholly insufficient testimony before the grand jury, will justify setting the indictment aside. But, just as an indictment cannot be set aside on a showing that the testimony upon which it was found, though competent and apparently sufficient, was in fact false and perjured, so an information properly verified on its face cannot be set aside on a showing that the affiant had no personal knowledge of the matters to which he swore in verifying it. *The sufficiency of the verification must be determined from what is stated therein, and not from evidence aliunde.*' (Emphasis ours.)

"Judge Richardson then stated that after a diligeent search he had been unable to find any authorities to sustain the position of the defendant and proceeded to cite many adjudicated cases from other jurisdic-

tions sustaining his conclusion. He then further stated in his opinion:

" 'The foregoing are all the cases we have been able to find on the question, and as will be seen they are all of one accord. When we consider the great variety of criminal cases, the widely different forms in which they arise, and in many instances the various and disconnected sources from which fragmentary pieces of evidence must be obtained, conclusive when considered together but no portion of which is sufficient alone, and the further fact that the circumstances are often such that no one witness in the case can truthfully say that he has personal knowledge that all the facts necessary to be charged in the information are true, it may well be doubted whether the law contemplates that the verification of an information must be made by one having personal knowledge of all the essential facts charged. In any event we are in accord with the cases cited above, and we hold that where the verification of an information is in due form, no issue can be made as to the knowledge or want of knowledge of the person who verified it for the purpose of quashing or setting aside the information, either before the trial or during its progress.'

"The court has adhered to the above decision in many cases. *Munn* v. *State*, 5 Okla. Cr. 245, 114 Pac. 272; *Oelke* v. *State*, 10 Okla. Cr. 49, 133 Pac. 1140; *Boswell* v. *State*, 19 Okla. Cr. 443, 200 Pac. 256; *Logan* v. *State*, 42 Okla. Cr. 1, 274 Pac. 39; *Haggard* v. *State*, 51 Okla. Cr. 233, 1 P.2d 180. The rule of law adhered to in all of the above cases is succinctly set forth in *Boswell* v. *State*, *supra*, as follows:

" 'Where an information in legal form is verified as true in positive terms, such verification constitutes a sufficient showing of probable cause to authorize the issuance of a warrant of arrest and to put the defend-

ant on trial, and on a demurrer to the information and motion to quash the warrant no issue can be made as to the knowledge or want of knowledge of the facts charged on the part of the person who verified the information; nor can the information be set aside on the ground that the person who verified it had no personal knowledge of the facts verified.'

"Counsel for the defendant asks us to reconsider and overrule the decisions above cited and many others to which this court has consistently adhered. In view of the earnestness with which this proposition was presented by counsel, we have closely read the above decisions and considered the arguments of counsel, and we are firmly of the conviction that the decision by Judge Richardson in *Moss* v. *State*, which formed the foundations for all the subsequent decisions, was fundamentally sound and in accordance with constitutional principles. Accordingly, neither the committing magistrate nor the district judge erred in overruling the motions to quash based upon the attack made on the verification of the preliminary complaint.

"It is further contended that the justice of the peace court was without jurisdiction to proceed with the instant case and that the prosecution was invalid for the reason that an order had not been made by the district court directing or authorizing further prosecution after the indictment charging the same offense had been dismissed.

"The record discloses that after the original indictment was returned against the accused and two other individuals that they filed their separate motions before the district court challenging the grand jury panel. After a hearing on said challenges the district court on October 24, 1949, made the following order:

" 'I have carefully considered all the evidence in this case, and have come to the conclusion that the motions of the defendants challenging the Grand Jury Panel and to Quash the Panel must be sustained as a matter of Law.

" 'The principal contention of the defendants is that the Grand Jury was not drawn and empaneled as provided by law, pointing out the fact that fifty jurors were summoned rather than a maximum of twenty-four, as provided by statute, from which to select the Grand Jury, permitting the so-called "hand-picking" of a jury.

" 'I am not unmindful of the more recent decisions of our appellate courts and particularly the *Childers* case, wherein the Supreme Court pointed out that the mere ordering of a larger number of Grand Jurors drawn, was not, *per se*, error warranting the quashing of an Indictment. Our appellate courts have long adhered to the rule that although this is an irregularity, it is not fatal, and that a substantial compliance with the law is all that is necessary.

" 'In this case, however, the defendants have brought to the attention of the Court numerous other facts, circumstances, and incidents occurring prior to the empaneling of the Grand Jury, during its sessions, and subsequent to its adjournment up to the day preceding this hearing, none of which, standing alone, would be sufficient to warrant the quashing of this Grand Jury; but considering all of these irregularities as a whole, I am convinced that there has not been a substantial compliance with the laws of this state, and from the Record in this case, it must be presumed, as a matter of law, that bias and prejudice existed resulting in the defendants being deprived of a substantial right.

" 'I am certain that everyone connected with the empaneling and subsequent operation of this Grand Jury acted in good faith, and attach no importance to the charge that Mr. Holloway was not authorized to appear before the Grand Jury as Assistant County Attorney. In view of the entire record, I am convinced that, as a matter of law, the defendants in these cases did not receive that fair and impartial consideration by a Grand Jury, to which they, as citizens, were entitled under the due process clauses of both the State and Federal Constitutions.

" 'This finding, of course, has no bearing on the guilt or innocence of any of the defendants, as that issue is not before the Court in this proceeding, and the *County Attorney may, in his discretion, either file Informations or request the empaneling of another Grand Jury to inquire into these same matters.* (Emphasis ours.)

" 'The motions of the separate defendants to quash the Grand Jury Panel are sustained in each case and all of its actions with reference to these cases are adjudged to be ineffective and invalid.'

"Counsel for the accused cite the statute relative to the sustaining of a demurrer to the information and the case of *Ray* v. *Stevenson,* 71 Okla. Cr. 339, 111 P.2d 824. The statute relied upon reads:

" 'If the demurrer is sustained, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of opinion that the objection on which the demurrer is sustained may be avoided in a new indictment or information, direct the case to be resubmitted to the same or another grand jury, or that a new information be filed.' 22 O. S. 1951, Sec. 508.

"*Ray* v. *Stevenson* is not in point as it involved a factual situation entirely different from that now before the court and did not involve a motion to quash or a challenge to a jury panel.

"We think the contention of counsel cannot be sustained for three reasons:

" '1st. If counsel were right in his contention we believe that the order of the district judge constituted an authorization for the county attorney in his discretion to file a new information (See emphasis in above order). *Hollins* v. *State,* 56 Okla. Cr. 275, 38 P.2d 36.

"2nd. By statute it is provided as follows:

" 'An order to set aside an indictment or information as provided in this article is no bar to a further prosecution for the same offense.' 22 O. S. 1951, Sec. 501.

"See *State* v. *Stout*, 90 Okla. Cr. 35, 210 P.2d 199; *Ray* v. *Stevenson, supra.*

"3rd. This was not an attack upon the information but was simply a challenge to the jury panel.

"It is next contended that the evidence was insufficient in that there was no corroboration of the testimony of A. C. Reyonlds, who under the evidence, was an accomplice of the defendant.

"Reynolds testified that he entered the name 'Ted Smith' on the permanent sales record of the treasurer's books of account at the direction of Vahlberg. We think under the evidence it is reasonable to conclude that Reynolds was an accomplice of Vahlberg in making the false entry and should have been corroborated. However, there is ample corroboration of the defendant's complicity in this crime. His statement to Mrs. Hasley at the time of the sale when she sought to place

a bid for the property in the name of J. A. Burt, Jr., 'that is sold isn't it Jack' (addressing himself to Reyonlds); his procuring the assignment of the tax certificate purportedly signed by 'Ted Smith' and delivering it to J. A. Burt, Jr.; his writing of his own personal check to pay for 199 pieces of property, all of which were shown by the treasurer's books to have been sold to 'Ted Smith', were all corroborative facts and were independent evidence of the defendant's guilt sufficient along with the testimony of the alleged accomplice to sustain the conviction. The tax certificate was issued to 'Ted Smith' and was in the possession of the defendant Valberg. The court properly instructed the jury concerning the necessity of corroboration of the testimony of the accomplice and no exception was saved to any of the instructions given in that connection.

"The defendant also attacks certain of the instructions which were given by the court. Instruction No. 5, to which objection was made, reads:

" 'The law prescribes but one way by which property may be sold at tax sale, and that is by a public sale cried by the County Treasurer in his office, and upon public acceptance by him of the highest bid, publicly and openly made by a person attending the sale, bidding in his own behalf or as representative for some other person. The highest bidder for any particular parcel of land thus being entitled to have his name entered in the return of sale and the tax sale record as the "purchaser" thereof, as a part of the official records showing that he purchased the property at public sale in the manner prescribed by law, and that as a result of such transaction is entitled to receive a tax certificate, which if not redeemed by the land owner within a period of two years may thereafter be used as the basis for procuring a tax deed.

" 'An entry made by or under the direction of the County Treasurer, of the name of any person either real or fictitious, purporting to be the "purchaser" of a parcel of land, upon the official tax sale record, knowing that no public bid was actually made by or on behalf of such purported purchaser and accepted by the Treasurer as the highest bidder at public sale pursuant to law, would constitute a "false entry in a book of account" kept in the office of the County Treasurer, affecting the interests of the owners of the property involved in such purported tax sale. Any person making or causing such a false entry to be made with intent to defraud, would be guilty of forgery in the second degree.'

"Counsel state that the first part of this instruction is erroneous for the reason that under the authority of *Oklahoma City* v. *Vahlberg,* 185 Okla. 28, 89 P.2d 962, the Supreme Court of Oklahoma held that 'in case no one bids on the property, the property is by operation of law sold to the county.' Counsel is correct as to the manner in which property is sold to the county where there is no bid placed on the property. However, after carefully considering the above instruction we think it is a fair statement of the law relative to the issues before the jury. The only way in which a tract of land can be sold to an individual at a tax sale is in the manner stated in the first part of this instruction. This instruction has to be considered in connection with Instruction No. 4, to which no objection was made, and which reads:

" 'The laws of this State further provide that on the first Monday in November in each year the County Treasurer shall offer at public sale at his office all lands which shall be liable for taxes, and that such property shall be sold to the person who offers to pay the amount due on any parcel of land for the smallest

portion of the same, since such person shall be considered the highest bidder.

" 'The law further requires that the County Treasurer make a return of tax sale showing the land sold, the name of the purchasers and the sum paid by them; and that a list of all ands or town lots sold, a description of the same, the amount of sale, the date of sale and the name of the person to whom sold, shall be transcribed from the return of sale to the tax sale record being the record identified in evidence in this case as Exhibit No. 7.'

"Instruction No. 6 constituted a fair explanation of the state's theory of the case and of the law pertaining thereto and we cannot find where the instruction is erroneous in any particular.

"Defendant attacks that part of Instruction No. 3 in which the court stated:

> " 'In this connection, you are instructed that the record books referred to in this case as the "Work Record" and the "Permanent Tax Sales Record" admitted in evidence and identified as Exhibits No. 6 and No. 7 are "books of account" kept in the office of the County Treasurer of Oklahoma County, within the meaning of the foregoing provision of law.'

for the reason that he contends it constituted a comment by the court on the weight of the evidence and was an invasion of the province of the jury for the reason that one of the issues in the case was whether the purported tax sales records identified by the county treasurer were books of account required to be kept by the treasurer; that this was an issue of fact for the determination of the jury and was not a question of law to be determined by the court.

"At first glance this contention seems to have substantial merit but a fuller consideration has convinced us that whether the documents identified by the county treasurer as the 'return of sale' and 'record of sales' being Exhibits No. 6 and 7 were books of account were legal questions which should be decided by the court and not left for construction by laymen on the jury. The general rule is stated as follows:

" 'Generally, the interpretation of construction and the meaning of legal effect of written instruments are matters of law for the court.' 53 American Jurisprudence, Sec. 250, Trial.

"Where the interpretation to be given to a written instrument depends upon collateral and extrinsic circumstances it then becomes a question for the determination of the jury to be aided by proper instructions by the court.

"Tit. 68, O. S. 1951, Secs. 386 and 387 are the statutory provisions making it mandatory for the county treasurer to make a 'return of sale' in connection with his handling of the annual tax sale, and further makes a requirement that a permanent record of sales in which certain data is set forth must be kept by the treasurer. County Treasurer Hale, when he was a witness, testified as to the existence of these records in the treasurer's office in connection with the 1946 tax sale and without objection he testified that these were records required by law to be kept by the treasurer. Whether or not the work record described as Exhibit 6, and permanent sales record identified as Exhibit 7 were books of account in accordance with the statute under which the prosecution was maintained was a question of law for the court to determine. No issue was made as to this question in the trial of the case. The defendant Vahlberg did not attempt to con-

tend that these exhibits were not books of account required to be kept by the treasurer. His defense, as hereinabove pointed out, was denial that he made a false entry in the records or authorized it to be done, but he stated that the alleged false entry was made without his knowledge or consent by persons who imposed upon him because of his advanced age.

"In the case of *Hoovel* v. *State* (Tex.), 69 S.W.2d 204, the Court of Criminal Appeals of Texas held:

" 'It is within the province of the trial court to construe the legal effect and meaning of documents and other written instruments and a charge on such legal effect and meaning would not be a charge on the weight of the evidence.'

"In *Richanbach* v. *Ruby* (Oregon), 271 Pac. 600, the Supreme Court of Oregon held that it was the duty of the court in its instructions to construe documents introduced in evidence and clear up all doubt in the minds of the jury as to the legal effect thereof.

"We have carefully considered not only the instructions to which complaint was made but all of the instructions and it is our conclusion that they constitute a substantial statement of the law pertaining to the issues before the jury. Although exceptions were saved to certain of the instructions hereinabove discussed there were no requested instructions presented on behalf of the defendant and counsel for the accused did not point out to the trial court wherein they thought the instructions to which exceptions were taken were erroneous.

"This was a voluminous record and lengthy briefs have been filed on behalf of the accused in which each specification of error was argued. It is doubtful if there was ever a trial without some error being made. Sometimes the error is trivial, sometimes so glaring

that an appellate court is forced to reverse the trial court's judgment. This case was hard fought with able lawyers valiantly pleading the cause of their client. The court being called upon to make instant decisions during the trial might have made a few mistakes. But the mistakes were very few and wholly immaterial and did not affect the outcome of the trial nor deny the defendant a fair trial. If this case were tried a dozen times, in all probability there would never be a trial with fewer mistakes than the instant case. The defendant has been given a fair trial in substantial compliance with the law and has no just cause for complant. He was simply caught in a trap of his own planning and when the showdown inevitably came he had no reasonable explanation for his conduct.

"This brings us to the final contention of the defendant in this case as to the alleged excessiveness of the punishment. This was not a case where the jury fixed the punishment. The verdict of guilty was returned but the punishment to be meted out to the defendant was left to the discretion of the trial court. The court in his discretion could have fixed the punishment by imprisonment in the penitentiary for any period not exceeding seven years. It could have been as low as one day. Counsel for the accused contend that even under the state's evidence the most that the defendant was guilty of was a misdemeanor, citing the statute which would prohibit the county treasurer from voluntarily becoming interested in a county tax sale either directly or indirectly (21 O. S. 1951, Sec. 344). The county attorney was vested with authority to make an election whether to prosecute the accused for a misdemeanor, which would only carry a jail sentence, or the more serious felony charge. It is always difficult to determine what punishment is ade-

quate in any particular case. The penalty should always be sufficient to punish the wrongdoer and serve to deter others from committing similar offenses. Hatred, revenge and mob pressure largely determined the punishment among barbarians but they have no place in a civilized society. The chief difficulty in this case arises from the extreme old age of the defendant and his physical condition. He is 85 years of age and according to the record before us is in poor health. This factor alone impels us to the conclusion that to sustain the sentence of five years imprisonment in the penitentiary would be tantamount to a life sentence, and that the facts do not justify the imposition of so severe a punishment. In fact the legislature, as pointed out by counsel for the accused, in another statute has stated that the acts committed by the accused would only amount to a misdemeanor and the most that could be meted out upon a conviction would be a jail sentence. But in this case we have no alternative except to commit the accused to the penitentiary for the reason that the statute only provides for a penitentiary sentence.

"For the reason that we are holding that the prosecution could be maintained on the felony charge of forgery it is our conclusion, after giving the fullest consideration to the many profound legal questions presented on behalf of the accused and to all the other facts and circumstances in the record, that justice would be fully served by reducing the sentence assessed against the accused to a term of 120 days imprisonment in the state penitentiary.

"It is therefore ordered that the judgment and sentence of the District Court of Oklahoma County be modified from a term of five years imprisonment in the penitentiary to a term of 120 days in the peni-

tentiary, and the judgment and sentence as thus modified is affirmed.

"BRETT, P. J. AND
"POWELL, J. CONCUR."

This petitioner, W. F. Vahlberg, shows that after the rendition of said opinion, hereinabove set out, a petition for rehearing was duly filed within the time allowed by law and on November 12, 1952, the same was denied. After the denial of said petition for a rehearing, this petitioner made application to the said Criminal Court of Appeals for an order staying mandate pending appeal or appellate proceedings in the Supreme Court of the United States for the purpose of reviewing the opinion of the Criminal Court of Appeals of the State of Oklahoma, said order staying mandate is in words and figures as follows, to-wit:

"IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

"W. F. Vahlberg, "Plaintiff in Error,	)	
vs.	)	NO. A-11,628
"The State of Oklahoma, "Defendant in Error.	)	

"Order Staying Mandate Pending Appeal to the United States Supreme Court and With Directions in the Event Same Is Not Perfected in 60 Days.

"Now, on this 24th day of November, 1952, this matter comes on for hearing upon the application of plaintiff in error, W. F. Vahlberg, for stay of mandate pending appeal of the within cause to the United States Supreme Court, it appearing from said application that the plaintiff in error intends to and will file in the office of the Clerk of the United States Supreme Court

his appeal; and it appearing to this court that the plaintiff in error has commenced preparation of the record for proceedings in the Supreme Court of the United States in good faith toward the perfecting of said appeal by ordering the record prepared herein for said appeal; and it further appearing by reason of the aforesaid things that the mandate of this Court herein should be stayed for a reasonable time.

"It is therefore considered, ordered, adjudged, and decreed that the mandate of this court herein should be and the same is hereby stayed for a period of 60 days, or during the pending of said appeal in the Supreme Court of the United States.

"It is further considered, ordered, adjudged, and decreed in the event said appeal is not perfected within the Supreme Court of the United States within the 60 days heretofore granted, the mandate of this court shall and is hereby directed to forthwith issue.

"John A. Brett,

Presiding Judge.

"Attest:

"Andy Payne,

Clerk, Criminal Court of Appeals."

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257(3) and Sec. 2101(d). The reasons for the granting of the writ prayed for herein and a statement of the factual situation will hereinafter be set out under reasons for granting the writ.

QUESTIONS PRESENTED

The questions presented in this case are in number three, to-wit:

1. The preliminary information or complaint upon which the warrant issued was wholly insufficient for the reason that the affiant had no knowledge whatsoever of the facts set forth in the preliminary information or complaint and only verified the same because the County Attorney of Oklahoma County, State of Oklahoma, told him to sign his name to the complaint;

2. In the trial of the case before the jury, the trial judge took away from the petitioner the right to a trial by jury by instructing the jury that certain exhibits constituted public records required to be kept under the laws of the State of Oklahoma, when, in truth and in fact, they were not public records, and this denied the petitioner a right to a trial by jury as guaranteed to him by both the State and Federal Constitution;

3. The petitioner further shows that he was charged in the preliminary information or complaint with a conspiracy to violate the law and that he was tried in the District Court on a charge of forgery in the second degree upon which he had not had a preliminary examination and had not waived one; and, therefore, this denied to the petitioner due process of law and violated his rights as guaranteed to him under the Fourteenth Amendment to the Constitution of the United States of America.

That, in the proceedings as will be hereinafter pointed out, in all three instances set forth above, the petitioner herein was deprived of his Constitutional rights under the

Constitution of the State of Oklahoma and under the Constitution of the United States of America in that he was not tried and convicted in accordance with the laws and the Constitution of the State of Oklahoma and was thereby denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT

The petitioner, 86 years of age, former County Treasurer, Oklahoma County, Oklahoma, which position he had held for a great number of years, was charged with conspiracy in the Justice Court of Oklahoma City by the filing of a complaint or preliminary information before a Justice of the Peace, which was signed and verified by one Sam Oliver. The said Sam Oliver had no information whatsoever concerning the alleged violation of the law but signed the complaint and caused a warrant to issue for the arrest of the petitioner merely because the County Attorney of Oklahoma County told him to so do. A motion to quash this warrant and dismiss this complaint or prelminary information was duly filed and it was admitted that Sam Oliver had no knowledge of any kind concerning this matter but verified the same because he was directed so to do, but the Justice Court held that this could not be inquired into and the District Court, upon proper motion, held that this matter could not be inquired into; namely, whether or not the affiant had any knowledge concerning the facts alleged in the preliminary complaint and sworn to by him; and that it did not make any difference from a legal

standpoint whether the affidavit was true or false and that a false affidavit was as valid, good, and binding as a true affidavit and that the petitioner's mouth was closed, so to speak, and he was not permitted to even question the knowledge of the affiant who signed the affidavit and caused the warrant to be issued and put in motion the judicial processes of the State of Oklahoma.

The Criminal Court of Appeals of the State of Oklahoma in the opinion, hereinbefore mentioned, held in accordance with the justice court and the trial court and held that the petitioner could not question the knowledge of the affiant who swore to the complaint or preliminary information in the justice court, upon which the warrant was issued and which, under Oklahoma law, is the foundation for the prosecution of a criminal case.

The petitioner now says and contends before this Court that this act upon the part of the courts denied him his constitutional rights and violated his rights as guaranteed to him by the Fourtheenth Amendment of the Constitution of the United States of America.

Section 30 of Article 2 of the Constitution of the State of Oklahoma is substantially the same as the Fourth Amendment to the Federal Constitution. It reads:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized."

Article 2, Section 17, of the Constitution of the State of Oklahoma is as follows:

> "No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint."

Title 22, Article 171, Oklahoma Statutes Annotated, is as follows:

> "When a complaint, verified by oath or affirmation, is laid before a magistrate, of the commission of a public offense, he must, if satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, issue a warrant of arrest."

The petitioner now states that by virtue of the fact that the justice court, the trial court and the Criminal Court of Appeals in this case refused to permit the petitioner to inquire into the fact that the affiant had no knowledge whatsoever, and this fact was admitted, denied to him his constitutional and statutory rights under both the United States Constitution, the Fourth Amendment, the Fourteenth Amendment, and the Oklahoma Constitution and statutory requirements and that the warrant should be quashed, and the complaint dismissed for such reasons.

The petitioner was charged in the justice court with a conspiracy, as more fully appears from a copy of the complaint in the justice court, which is in words and figures as follows, to-wit:

"INFORMATION

"In Justice Court, in and for Oklahoma City Justice District, Oklahoma County, State of Oklahoma.

"Before Howard Boyer, Justice of the Peace.

"The State of Oklahoma, "Plaintiff,	)	
	)	No. 483
vs.	)	8,976
"W. F. Vahlberg,	)	19,589
W. C. Bonney,	)	Preliminary Information
and DEWayne Hays,	)	
"Defendants.	)	

"Filed in District Court,
Oklahoma County, Okla.
August 16, 1951
"Cliff Myers, Court Clerk
By (Leonard C. Bowen)
Deputy

"In the name and by the authority of the State of Oklahoma, comes now Granville Scanland, the duly qualified and acting County Attorney in and for Oklahoma County, State of Oklahoma, and on his official oath gives the Justice Court in and for said Oklahoma County and State of Oklahoma, to know and be informed that heretofore, to-wit, on the 4th day of November, A.D., 1946, in Oklahoma County, State of Oklahoma, W. F. Vahlberg, W. C. Bonney and DeWayne Hays, whose more full and correct names are to your informant unknown, then and there being, did then and there wilfully, unlawfully and feloniously

commit the crime of FORGERY IN THE SECOND DEGREE in the manner and form as follows, to-wit:

"That W. F. Vahlberg, W. C. Bonney and DeWayne Hays, acting together co-jointly and in concert with each other in the county and state aforesaid, on the 4th day of November, 1946, the said W. F. Vahlberg was the duly elected, authorized, and qualified County Treasurer of Oklahoma County, Oklahoma; and that the said W. F. Vahlberg, W. C. Bonney and DeWayne Hays on said date were dealers and associated together in buying and selling tax sale certificates and tax titles, and operating under the assumed name of 'Ted Smith'; that Ida Hasley was the owner of an undivided one-half interest in the NE¼ of Section 32, Township 13 North, Range 3 West, in Oklahoma County, Oklahoma, the owner of the other undivided one-half interest being G. A. Nichols, and that on November 4, 1946, there was due on said property the sum of $155.74 ad valorem taxes for the tax year 1945; that at the regular November, 1946, tax sale, the said Ida Hasley appeared at said sale to buy a tax certificate to said property in the name of J. A. Burt, Jr., who held a mortgage on said property, and that when the property was 'cried' for sale the said Ida Hasley bid for the same in the name of J. A. Burt, Jr. for the amount of taxes due, but that the said W. F. Vahlberg, acting as County Treasurer, who was conducting the sale, advised the said Ida Hasley that said taxes had already been paid on the above described property, when in truth and in fact said taxes had not been paid, and that thereafter the name of 'Ted Smith' was endorsed on the 1946 permanent sales record of the County, a public book, showing that 'Ted Smith' had purchased the tax certificate on the above described property, and that thereafter on March 14, 1947, the said 'Ted Smith' assigned the said tax certificate, the

same being No. 5186 to the said J. A. Burt, Jr. and that thereafter on February 4, 1948, the said tax certificate was surrendered by the said J. B. Burt, Jr., all of which constitutes a false entry in the 1946 permanent sales record of the County Treasurer of Oklahoma County, which record recites that 'Ted Smith' purchased the said property at public sale, with the intent of the said W. F. Vahlberg, W. C. Bonney, and DeWayne Hays to defraud and cheat the said Ida Hasley out of said property, all of which constitutes the crime of forgery in the second degree contrary to the provisions of Title 21, O. S. 1941, Section 1586, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Oklahoma.

"Granville Scanland,
"County Attorney, Oklahoma County
"By /s/ Granville Scanland,
"County Attorney.

"State of Oklahoma, Oklahoma County, ss:

"I, Sam Oliver, being duly sworn on my oath, declare that the statements set forth in the above information are true.

/s/ "Sam C. Oliver

"Subscribed and sworn to before me this 26th day of October, 1949.

/s/ "Mildred S. Boyer
"Clerk for Howard M. Boyer
Justice of the Peace
201 Lynd Bldg.
128½ N. W. 2."

"On this 12th day of January, 1950, it appearing to me that the offense in the within information has been committed and that there is sufficient cause to believe

that the within named W. F. Vahlberg and DeWayne Hayes guilty thereof, I order that they be held to answer the same in the District Court, in and for Oklahoma County, State of Oklahoma, and that they be admitted to bail in the sum of $1,000.00 and be committed to the Sheriff of Oklahoma County until said bail is given.

/s/ "Willis R. Stark
"Justice of the Peace"

The amended information upon which the petitioner was tried is as follows:

"INFORMATION

"Filed: December 20, 1950
"Information

"IN THE DISTRICT COURT, IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA

"The State of Oklahoma,	)	
"Plaintiff,	)	Amended Information
vs.	)	
"W. F. Vahlberg,	)	No. 19587
"Defendant.	)	

"In the name and by the authority of the State of Oklahoma, comes now Granville Scanland, the duly qualified and acting County Attorney in and for Oklahoma County, State of Oklahoma, and on his official oath gives the District Court in and for said Oklahoma County and the State of Oklahoma, to know and be informed that heretofore, to-wit: on the 4th day of November, A.D., 1946, in Oklahoma County, State of Oklahoma,

W. F. Vahlberg

Whose more full and correct name to your informant is unknown, then and there being, did then and there wilfully, unlawfully and feloniously commit the crime of

FORGERY IN THE SECOND DEGREE

in the manner and form as follows, to-wit:

"That the said defendant, while then and there holding office as the duly qualified and acting County Treasurer of Oklahoma County, State of Oklahoma, did then and there make a false entry in a certain book of account kept in the office of County Treasurer of Oklahoma County, in that said defendant caused, procured and directed one A. C. Reynolds, Deputy County Treasurer in said office, to enter upon the November, 1946, tax sale record the name of 'Ted Smith' as the purchaser at tax sale had on said date of the following described property situated in said county:

> The NE¼ of Section 31, Township 13 North, Range 3 West of the Indian Meridian,

the record owners of said described property being Ida Hasley and Dr. G. A. Nichols; that the entry by said defendant of the name 'Ted Smith' at said sale as therein represented, all of which the said defendant then and there well knew; and said entry was one which affected or purported to affect the interests of Oklahoma County and Ida Hasley and Dr. G. A. Nichols in said property, and was made by said defendant as aforesaid with the intent to cheat and defraud the said owners of their property, contrary to the provisions of Title 21, O. S. 1941, Section 1586, and contrary to the form of the statutes in such cases

made and provided and against the peace and dignity of the State of Oklahoma.

"Granville Scanland,
"County Attorney, Oklahoma County,
/s/ "By: Jack E. Wilson
"Assistant County Attorney.

"State of Oklahoma, Oklahoma County, ss:

"I, Jack E. Wilson, being duly sworn on my oath, declare that the statements set forth in the above information are true.

/s/ "Jack E. Wilson

"Subscribed and sworn to before me this 20th day of November, 1950.

/s/ "Cliff Myers,
Court Clerk

/s/ "By: W. H. Regian,
Deputy"

The petitioner now shows that he at no time was given an examining trial or preliminary hearing upon the charge set forth in the Amended Information and that he was therefore denied his statutory and constitutional rights under the Statutes and Constitution of the State of Oklahoma to have a preliminary trial and that the variance between the complaint in the justice court, the Amended Information in the District Court upon which tried, constitute a fatal variance and that this was a denial of his rights under the Fourteenth Amendment to the Constitution of the United States in that he was denied due process of law.

The petitioner for his third ground and reason for asking this Court to issue a writ of certiorari and review this cause is that under the Constitution of the State of Oklahoma and the laws of the State of Oklahoma he was entitled to the jury trial upon all the material allegations of the information and that the District Judge in the trial of the said cause told the jury in his instructions to them that Exhibits "6" and "7" were books of account kept in the office of the County Treasurer of Oklahoma County within the meaning of the law of the State of Oklahoma, and the trial court used this language to the jury in Instruction Three:

> "In this connection, you are instructed that the record books referred to in this case as the 'Work Record' and the 'Permanent Tax Sales Record' admitted in evidence and identified as Exhibits No. 6 and 7 are 'books of account' kept in the office of the County Treasurer of Oklahoma County, within the meaning of the foregoing provision of law."

In this, the petitioner now shows that the trial court invaded the province of the jury and deprived the petitioner of his right to a trial by jury and deprived him thereby of due process of law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

Article 2, Section 20, of the Constitution of the State of Oklahoma, is in part as follows:

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed; * * *."

The petitioner now shows that by virtue of the giving of said instruction, the same deprived this petitioner of his rights under the Constitution and Laws of the State of Oklahoma. This petitioner shows that the Constitution of the State of Oklahoma heretofore referred to, being Article 2, Section 17, prohibits a person from being prosecuted for a felony by information without having had a preliminary examination before an examining magistrate or having waived such a preliminary examination and, by virtue of the fact that the petitioner did not have a preliminary examination upon a charge of forgery, the trial court was without jurisdiction to try him for forgery in the second degree when the only examining trial he had ever been accorded was where he had been charged jointly with W. C. Bonney and DeWayne Hays with conspiracy to violate the law.

To summarize the statement of this case, this petitioner shows that he was denied his constitutional and statutory rights under the Constitution and Statutes of Oklahoma in the following particulars:

1. The complaint was signed in the Justice Court by a person who had absolutely no knowledge whatsoever of any of the facts alleged in the complaint.

The Justice Court, the District Court, and the Criminal Court of Appeals of Oklahoma held that the petitioner could not show this to be true and that it was immaterial whether the affiant had any knowledge but, nevertheless, it was a valid complaint and the petitioner was denied any opportunity, right, or privilege to question the same. The Justice Court, the District Court, and the Criminal

Court of Appeals of Oklahoma refused to quash the warrant or dismiss the complaint and this under Oklahoma law being the foundation of any prosecution of any kind, this petitioner says he was denied his constitutional rights under the Constitution of the United States of America in that he was denied due process of law and that to hold that the words set out in the Constitution of the State of Oklahoma, Article 2, Section 17, requiring a duly verified complaint, means that a complete, false verification without any knowledge whatsoever is sufficient, is a violation of the Constitution, and the plain words thereof.

2. The second contention of the petitioner is that since Article 2, Section 17, of the Constitution of the State of Oklahoma, sets out that no person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate or having waived such preliminary examination, that in this case since the petitioner and two other persons were charged with conspiracy in the Justice Court and that in District Court the petitioner was tried for forgery in the second degree, that this shows conclusively that the petitioner did not have an examining trial on the charge of forgery in the second degree and that, therefore, he was denied due process of law in that the courts of Oklahoma did not follow the Constitution of Oklahoma and the Laws of Oklahoma, 22 O. S. A. 251-264.

3. The third and last contention presented in this statement to this Court is that the trial court violated the rights granted to the petitioner by Article 2, Section 20, of the Constitution of Oklahoma providing that the petitioner was entitled to and had the right to a trial by an impartial jury,

but that the trial court in Instruction Number 3 told the jury that certain exhibits offered in evidence were books of account required to be kept when this was one of the controverted causes in the case, and that, therefore, the petitioner was denied a jury trial in violation of the Constitution of the State of Oklahoma and was therefore denied due process of law in that he was denied a trial by a jury in violation of both the Statutes and Constitution of the State of Oklahoma and the Constitution of the United States.

This petitioner now shows that for these three reasons, or for any one of them, he is entitled to have this case reviewed by this Court and the cause reversed with proper instructions to the trial court.

SPECIFIC ERRORS TO BE URGED

The Criminal Court of Appeals erred in the following:

1. In holding that a verification made without any knowledge of any kind concerning the matter verified is valid and cannot be inquired into.

2. In holding that the trial court did not invade the province of the jury when the trial court instructed the jury that certain exhibits, namely Exhibits "6" and "7", offered in evidence constituted certain books of account required to be kept under the laws of the State of Oklahoma when this was a disputed question of fact, and should have been determined by the jury.

3. In holding that the petitioner had been accorded an examining trial when, in truth and in fact, according to the record he had received an examining trial upon a con-

spiracy charge and was tried in the District Court upon a charge of forgery in the second degree.

REASONS FOR GRANTING THE WRIT

1. The decision of the Criminal Court of Appeals, as set forth in its written opinion, makes an absolute nullity of the Constitution of the State of Oklahoma and the Statutes of the State of Oklahoma which require that before a warrant can issue there must first be filed "A DULY VERIFIED COMPLAINT."

The opinion holds that it was immaterial whether the person who makes the verification has any knowledge concerning the matter and this holding violates the rights of the petitioner under the Fourteenth Amendment to the Constitution of the United States and the Fourth Amendment in that it denies him equal protection of the law and permits him to be prosecuted, arrested, and imprisoned upon a false and perjured verification and does not permit him to question the same.

2. Clearly the opinion of the Criminal Court of Appeals is erroneous and takes away from the petitioner his constitutional rights under the Constitution and Laws of the State of Oklahoma to a trial by jury in holding that the trial judge may tell a jury that certain exhibits offered by the State; namely, Exhibits "6" and "7", are proper records required to be kept under the Laws of the State of Oklahoma when this was a controverted question of fact to be determined by the jury when, in truth and in fact, one of the exhibits constituted no more than a scratch

pad and these are the records which the petitioner was charged with forging or changing.

The petitioner therefore says that he was denied his rights under the Laws and the Constitution of the State of Oklahoma and was denied equal protection of the law and that the provisions of the Fourteenth Amendment to the Constitution of the United States were violated in this instruction.

3. The third reason for granting a writ is that the petitioner believes that clearly he was not granted the equal protection of the Law of Oklahoma in that the Law of Oklahoma and the Constitution of Oklahoma require that no person can be tried for a felony without having first had an examining trial before a Justice of the Peace or an examining magistrate or having waived one on the charge for which he is tried in the trial court.

In the case at bar this petitioner now shows that he was accorded an examining trial upon a conspiracy charge and that he was tried upon a forgery charge alone and without any other persons being charged with him or mentioned in the information.

It is therefore believed by the petitioner that he was not granted equal protection of the law and that under the Fourteenth Amendment to the Constitution of the United States of America he was denied in each and every instance due process of law and equal protection of the law.

This petitioner believes and therefore alleges that in the failure of the court to grant him his rights under reasons one, two, and three that he was denied due process of law and equal protection of the law and therefore under

the Constitution of the United States of America this Court should grant the Writ and reverse this cause.

This petitioner now shows that he is attaching hereto a brief in support of his contentions herein, and that the Criminal Court of Appeals entered the following order:

"IN THE CRIMINAL COURT OF APPEALS
STATE OF OKLAHOMA

"W. H. Vahlberg, Plaintiff in Error,	)	
vs.	)	No. A-11628
"The State of Oklahoma, Defendant in Error.	)	

"FILED
"In the Criminal Court of Appeals
of Oklahoma
"January 16, 1953
"Andy Payne
Clerk

"ORDER

"NOW on this 16th day of January, 1953, the above-styled and number cause comes on for consideration by this Court upon the application of the Plaintiff in error asking the Court to grant to him 10 days' additional time in addition to the 60 days heretofore granted within which to file a petition for Writ of Certiorari or Appellate Proceedings in the Supreme Court of the United States.

"The Court finds that the Plaintiff in error has ordered the record in this case and that the same has been duly printed and certified by the Clerk of this Court and that the Plaintiff in Error has caused a petition for Writ of Certiorari to be printed and a brief in support thereof and that the same is now being

printed and that the application should therefore be granted.

"IT IS THEREFORE ORDERED AND DECREED BY THIS COURT that the Plaintiff in error be and is hereby granted the ten days' additional in addition to the 60 days granted by this Court within which to file in the Supreme Court of the United States a petition for Writ of Certiorari or an Appeal and the Mandate in this cause is stayed pending such time and in case the petition is filed or appellate proceedings begun in the Supreme Court of the United States within said time then and in that event the mandate is further stayed pending the appeal in the Supreme Court of the United States.

"IN WITNESS WHEREOF I have hereunto set my hand on this the 16th day of January, 1953.

/s/ "J. C. Powell,
Presiding Judge,
Criminal Court of Appeals,
State of Oklahoma.

"ATTEST:
"Andy Payne,
Clerk of Criminal Court of Appeals,
State of Oklahoma.

"I, Andy Payne, Clerk of the Criminal Court of Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Order in the above matter, as the same remains on file in my office.

"In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 16th day of January, 1953.

"Andy Payne, Clerk."

(Seal).

CONCLUSION

For the foregoing reasons, this petitioner most respectfully prays that a Writ of Certiorari be granted herein.

Respectfully submitted,

JOHN B. OGDEN,
1408-9 Liberty Bank Building,
Oklahoma City, Oklahoma,

Counsel for Petitioner.

January, 1953.

No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1952

W. F. VAHLBERG,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A statement of this case is fairly well presented in the foregoing petition for a Writ of Certiorari. In order, however, for this Court to have a full and complete understanding of the issues that were involved, the petitioner deems it advisable to make a brief statement of this case.

The petitioner served for a great number of years as County Treasurer, Oklahoma County, State of Oklahoma, and is now 86 years of age, having retired from public life voluntarily. He was charged, together with two other persons, namely W. C. Bonney and DeWayne Hays, a member of the Bar of Oklahoma, with acting conjointly in se-

curing a tax title to a piece of property at a tax sale which sale was conducted by the petitioner in this case in his official capacity as County Treasurer.

In the complaint filed against this petitioner before the Justice of the Peace Court sitting as an examining magistrate, one Sam Oliver signed the complaint without having any knowledge whatsoever concerning the facts therein alleged but signed the complaint by reason of the fact that the County Attorney of Oklahoma County, State of Oklahoma, told him to sign it. All the parties were discharged before final trial except the petitioner in this cause and he was tried upon an information charging him alone with having committed the crime of forgery in the second degree by changing the public records of the tax sale in the County Treasurer's office and causing the records to show that one Ted Smith purchased the property at the tax sale. This was an original sale and under the law of the State of Oklahoma, it became the duty of the County Treasurer to buy the property if no one else bid on the property.

The proceeding, as set out by the law of the State of Oklahoma, is, and was, that a certificate would issue to the purchaser at this sale. The purchaser would hold the property for two years, *i.e.* hold these certificates for two years, and then, if the owner had not redeemed the property, the holder of the certificate would then make application to the proper authorities for a deed. Before a deed could issue to the holder of the certificate a sixty (60) days' notice in writing must be served by the Sheriff of the County upon the original owners and, any time before the deed was actually issued, the owners could still redeem the property.

Consequently, it was from a factual situation an impossibility for the petitioner or anyone else to defraud anyone by paying the taxes of the original owners and taking a certificate and this constituted the so-called original sale. It was charged that the petitioner in this case told a deputy in his office to have the records show that Ted Smith had bought the property at this original sale. The cases will hereinafter be cited in this brief from the Oklahoma Supreme Court to the effect that if anyone does not bid at the original sale, the property automatically or by operation of law is sold to the county. These matters, however, have nothing to do with the merits of this application before this Court except to give the Court a full understanding of the nature of the charge against the petitioner in the trial court.

It was argued in the Criminal Court of Appeals of the State of Oklahoma that there could be no way in which any person could be defrauded if all the facts alleged were true but the Criminal Court of Appeals of the State of Oklahoma in its opinion, which is set out in the petition asking this Court to review this case, found that Oklahoma County could have possibly been defrauded in some amount less than four dollars.

The petitioner was convicted of forgery in the second degree and sentenced to five years' imprisonment in the State Penitentiary of Oklahoma. On appeal the Criminal Court of Appeals of the State of Oklahoma affirmed the judgment but modified the same and reduced the punishment to 120 days imprisonment in the State Penitentiary.

The petitioner filed a petition for rehearing and the same was denied. Thereafter, he filed an application for leave to file a second petition for rehearing which was likewise denied.

The petitioner has therefore exhausted all of his remedies in the State Courts and has complied with the rule laid down by this Court in the case of *Darr* v. *Burford*, 339 U. S. 200.

The petitioner in this case having set forth at length and in full the opinion of the Criminal Court of Appeals of the State of Oklahoma in the petition for a Writ of Certiorari herein deems it unnecessary to further copy the record in this case for the reason that the opinion itself, which is now officially reported, sets forth the contentions, the pleadings, and the rulings sought to be reviewed herein. This petitioner has had made compiled and certified by the Clerk of the Criminal Court of Appeals of the State of Oklahoma a full transcript of the record herein but is not having the same printed on account of the fact that said record is very voluminous and by virtue of the further fact that the opinion of the Criminal Court of Appeals of the State of Oklahoma fully, fairly, and completely sets forth the contentions of the petitioner and a statement of the record, and, of course, the rulings of the Criminal Court of Appeals therein.

Upon the issuance of the Writ of Certiorari in this cause by this Court, this petition will have printed and filed herein, if requested or directed to so do, the complete record but in view of the statements hereinabove set out and the further fact that there will be no controversy by

the counsel as to the factual situation herein alleged, the petitioner has not had printed the whole record on file in the Criminal Court of Appeals of the State of Oklahoma.

The petitioner now shows that this case was styled in the Criminal Court of Appeals "Vahlberg versus The State, No. A11628" and was decided October 22, 1952, and a rehearing was denied November 12, 1952, and that said opinion of the Criminal Court of Appeals is reported in the Pacific Reporter, Second Series, Volume 249, beginning on page 736, and found in the advance sheets published by the West Publishing Company dated December 5, 1952.

The petitioner therefore contends that he has been denied his rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States of America in that the laws of the State of Oklahoma and the Constitution of the State of Oklahoma provide that before a warrant shall issue there must be first filed with the examining magistrate a duly verified complaint and since in this case the affiant, Sam Oliver, did not have any information regarding the facts alleged in the complaint, the complaint therefore did not meet the requirements of the Constitution and the laws of the State of Oklahoma, and, by virtue thereof, the petitioner was denied due process of law.

The Constitution of the State of Oklahoma, Article 2, Section 17, and Article 2, Section 20, and Title 22 of the Oklahoma Statutes Annotated, Article 171, all provide that the complaint must be verified and laid before the magistrate. The contention of the petitioner that this act does not constitute a verification and therefore the issuance

of the warrant was without authority and the examining magistrate did not acquire jurisdiction to issue the warrant or to conduct an examining trial, which constituted the basis for the prosecution.

Proposition Two which the petitioner presents to this Court is that the trial court instructed the jury that certain exhibits offered in evidence by the State were books of account kept in the office of the County Treasurer of Oklahoma County within the meaning of the law of the State of Oklahoma and in this the trial court invaded the province of the jury, which was tantamount to denying the petitioner a trial by jury on these controverted questions of fact when in truth and in fact the petitioner believes that the exhibits constituted nothing more than work sheets and were not work records required to be kept by the County Treasurer under the laws of the State of Oklahoma, but at most the petitioner contends this was a question of fact to be determined by the jury and not by the court. This in effect directly deprived the petitioner of a trial by a jury and these are the records which the petitioner was charged with changing and thereby committing forgery.

The petitioner for his third ground and reason for presenting this petition to this Court shows the Court that he was actually charged with a conspiracy in the Justice of Peace Court and was charged with acting jointly and in concert with W. L. Bonney and DeWayne Hays in the commission of a forgery but in the trial of the case in the District Court he was charged alone with having committed an act of forgery.

Therefore, the petitioner contends that he had never ıd an examining trial or waived one and since the Con-itution and laws of the State of Oklahoma provide that :fore a person can be tried in the District Court on a lony charge he must first have had an examining trial · waived one, the petitioner therefore was denied his ɔnstitutional and statutory rights of having a preliminary xamination on the charge for which he was tried and ɔnvicted in the District Court and a failure in this respect ɔnstitutes a denial of due process of law.

The petitioner believes that the above gives to this ɔurt a fair statement of the facts.

ARGUMENT AND AUTHORITIES

Proposition I.

The "preliminary information" was not verified within e meaning of the law and as required by law and was, erefore, insufficient to authorize the issuance of a warrant to confer jurisdiction upon the Justice Court.

This proposition, as stated, briefly and succinctly pre-nts the particular subject matter to which this brief is ldressed.

The questions involved are serious constitutional ques-ɔns, the proper decisions upon which will tend to mark e course of future events as they may, and probably ill affect "life, liberty and the pursuit of happiness" ıder the American system and philosophy which recog-zes the sanctity of individual rights. If, under the guise government by law, a man may be deprived of his liberty ıder a warrant of arrest issued by a magistrate, under

circumstances such as those in the instant case, the principles inherent in the Magna Charta may well be said to have been laid to rest. And if, having challenged tyrannical and unconstitutional methods such as those leading up to the arrest in this case, an accused defendant may not be heard to prove the constitutionality of such acts, methods and procedure, then the Constitutions of the State of Oklahoma and of the United States of America, insofar as they purport to contain "Bills of Rights," might as well not have been written.

In truth, the Constitutions of Oklahoma and of the United States contain identical prohibitions against the very thing which happened to bring about Vahlberg's arrest in the instant case.

Statements of Principles

I.

Where constitutional rights are involved, there is always a remedy;

II.

When a Warrant of Arrest is void because of violation of constitutional rights and same is timely attacked, all subsequent proceedings are void including any conviction of the crime charged;

III.

Questions of constitutional law should be raised by the party relying thereon at the earliest opportunity;

IV.

Where a State has a code of statutory criminal procedure, that State cannot preclude the exercise of

constitutional rights and remedies by failing to provide for their exercise in the code;

V.

Any state statute which attempts to deny, abridge, circumvent, curtail, restrict, or limit the exercise of constitutional rights is invalid and void;

VI.

The first court to which a constitutional question is presented must always decide it and as early as possible;

VII.

Every court must determine its own jurisdiction, and when its jurisdiction is challenged, it can proceed no further until it has determined its jurisdiction;

VIII.

Where constitutional rights are invoked and their existence or nonexistence depends upon the proper determination of facts, evidence must be taken to establish the existence or nonexistence of the essential facts, and it denies due process of law to deny a person claiming constitutional rights and exemptions the opportunity to establish them upon a hearing at which they may introduce their evidence and make their argument;

IX.

Where the jurisdiction of the court is called in question, and the existence or nonexistence of such jurisdiction depends upon proper determination of facts, the party challenging the jurisdiction has the constitutional right to have the matter set for hearing and to introduce his evidence in support of his position, and the denial of a hearing thereon constitutes denial

of due process of law and equal protection of the laws in violation of both State and Federal Constitutions.

With these things in mind, we first proceed to citation and quotation of applicable provisions of the Constitution of the United States and of the Constitution of the State of Oklahoma.

United States Constitution

Section 2 of Article IV of the Federal Constitution reads:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The second paragraph of Article VI of the Federal Constitution reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, Any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fourth Amendment to the Federal Constitution reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but, upon probable cause, *supported by Oath or affirmation*, and particularly describing the place to be searched, and the persons or things to be seized" (Italics ours).

The Fifth Amendment to the Federal Constitution reads in part:

> "No person * * * shall be deprived of life, liberty or property, without due process of law; * * *."

The Ninth Amendment to the Federal Constitution reads:

> "The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Section 1 of the Fourteenth Amendment to the Federal Constitution reads in part:

> "*No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States;* nor shall any State deprive any person of life, liberty, or property, *without due process of law;* nor deny to any person within its jurisdiction the equal protection of the law" (Italics ours).

Constitution of Oklahoma

The Preamble of the Constitution of Oklahoma reads:

> "(1) Invoking the guidance of Almighty God in order to secure and perpetuate the blessing of liberty; *to secure just and rightful government;* to promote our mutual welfare and happiness, we, the people of the State of Oklahoma, do ordain and establish this Constitution" (Italics ours).

It is held in *Ex parte Owens,* 37 Okla. Cr. 118, 258 Pac. 758, that the Constitution of the State is the great Charter of our rights, to which the humblest may at all times appeal, and to which the highest must at all times submit.

And in *State* v. *Barnett*, 60 Okla. Cr. 380, 69 P.2d 88, it was held that the Constitution of the United States is the supreme law of the land, and next to it, and higher in authority than legislative statutes, is the Constitution of the State. The Court says when the statute comes in conflict with either, it must give way and the courts must decide whether or not such conflict exists.

Section 1 of Article 1 of the State Constitution reads:

> "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."
>
> —*State* v. *Burnett, supra.*

Section 1 of Article II reads in part:

> "All political power is inherent in the people; and government is instituted for their protection, security, and benefit * * *."
>
> —*Boyd* v. *U. S.*, 116 U. S. 616.

Section 2 of Article II of the State Constitution reads in part:

> "All persons have the inherent right to life, liberty, the pursuant of happiness, * * *."

Section 6 of Article II of the State Constitution reads:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

This provision is self-executing.

—*State* v. *Brown,* 24 Okla. 433, 103 Pac. 762;

State v. *Brown,* 8 Okla. Cr. 40, 126 Pac. 245;

Ex parte Leathers, 66 Okla. Cr. 172, 90 P.2d 452.

Section 7 of Article II of the State Constitution reads:

"No person shall be deprived of life, Liberty, or property, without due process of law."

—*McKeever Drilling Co.* v. *Egbert,* 170 Okla. 259, 40 P.2d 34.

"Due process of law" as used in this Section is synonymous with "law of the land" as found in the Magna Charta.

—*Ex parte Sullivan,* 10 Okla. Cr. 465, 138 Pac. 815.

Section 17 of Article II of the State Constitution reads in part:

"No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information."

—*Kay County Excise Board* v. *Davis* (Okla.), 103 P.2d 939.

Section 30 of Article II of the State Constitution is substantially the same as the Fourth Amendment to the Federal Constitution. It reads:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; *and no warrant shall issue but upon probable cause supported by oath or affirmation,* describing as particularly as may

be the place to be searched and the person or thing to be seized" (Italics ours).

This constitutional principle was first established in America by James Otis arguing against writs of assistance in Massachusetts. It was afterwards adopted in England by Lord Camden.

See:

—How. St. Trials, Vol. 19, page 1030.

Section 33 of Article II reads:

"The enumeration in this Constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

Under this Section, all rights which have come down to the people from the time of the Magna Charta are still preserved, and no statute can be passed to curtail any of these rights, one of which is to be free from arrests except upon an actual finding, in good faith of "probable cause" by the Magistrate based upon actual evidence before him, both as to fact and law, as hereinafter shown. It is not sufficient for anyone, even the County Attorney who has no knowledge other than hearsay evidence, to file, approve or verify such information. When one states that he has such knowledge, when he does not, that is what amounts to perjury, and if directed by a superior, that is also what amounts to subornation of perjury (21 O. S. 1951, Sec. 503).

If one (including the County Attorney) may not swear to the information upon "information and belief" clearly stated upon the face of the information, he cannot

swear to it upon "information or belief" or hearsay evidence while actually stating that he swears to it upon positive knowledge. If an accused has a constitutional right to have the information sworn to upon the basis of "actual knowledge," as all the cases hold, he then has a constitutional right to prove that the one who swore to the information actually had no "actual knowledge" but that he actually acted upon "information and belief." Any other view than this would mean that anyone (including the County Attorney) could, by committing perjury, put an alleged accused to arrest, detention and confinement and to a least a preliminary hearing, based solely upon perjury. It would mean that perjury and subornation could become the weapons of tyranny against which there could be no redress. Soviet ideology!

All of the fundamental law of the land (Constitution of the United States and Constitution of Oklahoma) as clearly shown above, requires that where anyone, whether by direction of the County Attorney or not, swears to any information, which leads to an arrest for a felony, the oath must have been determined by the magistrate, before issuing the Warrant of Arrest, to have been made within affiant's own knowledge, and that there is probable cause to believe that a crime has been committed and that it was committed by the one accused. If the question of perjury is raised, it must be determined by the issuing magistrate upon the basis of the true facts as to whether affiant had actual knowledge. In this case, no such "probable cause" was found by either the magistrate, the County Attorney or the one who swore to the information. In truth, no such "probable cause" could have been found because the one

who swore to the information was not in possession of "actual knowledge" of evidence or facts from which such "probable cause" could possibly have been found.

a. Unconstitutional state statutes and state court decisions giving effect to same must give way and fall before contrary provisions of the Constitutions, state or federal.

—*K. & L. Oil Co.* v. *Oklahoma City* (D. C., Okla.), 14 Fed. Supp. 492;

Ex parte Walrod, 73 Okla. Cr. 299, 120 P.2d 783;

Emch v. *Guymon,* 75 Okla. Cr. 1, 127 P.2d 855;

U. S. v. *Eason Oil Co.* (D. C., Okla.), 8 Fed. Supp. 365;

Trapp v. *Cook Construction Co.*, 24 Okla. Cr. 850, 105 Pac. 667;

Thomas v. *Reid,* 142 Okla. 38, 285 Pac. 92;

State v. *Barnett,* 60 Okla. Cr. 355, 69 P.2d 77.

b. There can be no statutory limitations which override the exercise of constitutional rights or impair their efficient assertion.

The fundamental duty of courts to give effect to constitutional rights even to the point of declaring conflicting statutes unconstitutional was declared by Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch. (U. S.) 137, 2 L. Ed. 60, at the inception of our constitutional system. This principle has been rigidly adhered to and repeatedly asserted by all courts.

See:

—*Byars* v. *United States,* 273 U. S. 28, 71 L. Ed. 520, 47 Sup. Ct. 248;

Boyd v. *United States,* 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. 524;

Jones v. *Securities Exchange Commission,* 298 U. S. 1, 80 L. Ed. 1015, 56 Sup. Ct. 654.

c. Since it is uniformly held that one swearing to an information must do so upon facts within his own knowledge in order to comply with the Constitution of the United States, it can always be shown that he did not possess the requisite capacity and qualification in that he did not actually know the facts and thus that his verification was really upon information and belief and upon hearsay.

The man who swore to the information in these cases had no legal capacity to do so and did not possess the requisite constitutional qualifications. Petitioner was guaranteed the right to prove this and was entitled to a hearing guaranteed by the Constitutions.

At an early day, this was settled by Federal cases arising under the Federal Constitution. For instance, see: *United States* v. *Tureaud* (D. C., La.), 20 Fed. 621 (cited with approval and followed by the Criminal Court of Appeals in *Salter* v. *State,* 102 Pac. 719), where it is said:

> "The rule which was established (under the Constitution of the U. S.) was that the warrant should issue 'only upon probable cause, supported by oath or affirmation of the person making the charge, in which should be stated *the fact within his own knowledge* constituting the grounds of such belief or suspicion'."

And also:

> "The 'probable cause supported by oath or affirmation,' prescribed by the fundamental law of the United States, is, then, the oaths or affidavits of *those persons who, of their own knowledge, depose to the facts which constitute the offense.*"

The following Oklahoma cases squarely hold that an information sworn to upon "information and belief," is void and does not invest a court with power to issue a warrant:

—*Gore* v. *State*, 24 Okla. Cr. 394, 218 Pac. 545;

Ex parte Tulley, 40 Okla. Cr. 398, 112 Pac. 36;

Bennett v. *State*, 33 Okla. Cr. 244, 243 Pac. 531;

Ex parte Long, 26 Okla. Cr. 259, 223 Pac. 710;

Evans v. *Willis*, 22 Okla. 310, 97 Pac. 1047.

The opinion in *State* v. *Peterson* (Wyo.), 194 Pac. 342, quotes with approval from the opinion of the Supreme Court of Kansas in *State* v. *Gleason*, 32 Kan. 245, which quotation gives the reason for requiring the one swearing to the information to have actual knowledge and for permitting an early showing by the accused that the contrary was true, and that he did not have actual knowledge. In the opinion referred to, the Supreme Court of Kansas said:

> "The knowledge of the prosecuting attorney is generally founded on information and belief. In the nature of things he can have actual personal knowledge of but a small portion of the crime committed in his county. His information upon which his belief is founded is sworn to by no one. *No one is criminally liable if it should prove to be false and malicious.* Such verification furnishes no safeguard against unfounded and vexatious arrests" (Italics ours).

The Wyoming case last cited also cites with approval the *Tureaud* case, *supra*, and quotes from it at length. How much more potent is the reasoning of this opinion when applied to the action of a layman who acted solely under the direction of the County Attorney, with not even the safeguards of official responsibility to hold him in check?

The case of *DeGraff* v. *State of Oklahoma*, 2 Okla. Cr. 519, 103 Pac. 538, decided by Criminal Court of Appeals of the State of Oklahoma in 1909, contains a splendid discussion of the democratic principles for which we here contend. The importance to the citizenry of the State of the constitutional guaranties contained in the Bills of Rights is emphasized. We do not believe that one can read and carefully consider the language of Criminal Court of Appeals of the State of Oklahoma in the *DeGraff* case and then be not firmly convinced that the petitioner here should have been discharged upon his Motion to Quash the Warrant of Arrest. The *DeGraff* case is highly important in connection with this consideration.

That case squarely holds that:

> "1. The information must be verified by one having actual knowledge of all the facts necessary to support the information, or
>
> "2. The information must have specifically included within it the affidavits of all persons who know any of the necessary facts or that such affidavits must be attached to the information."

In other words, to be vaild, the information must be verified by the one person who knows all the necessary facts, or if all the facts are not known by one person, part

of them being known by one, part of them being known by another, and part of them being known by a third, *etc.*, the information is not valid or proper unless affidavits of all these persons are included within the information or attached thereto.

One of these two alternatives must be followed. If neither is followed, the information is not constitutionally filed and will not support the warrant. As indicated herein, the information would not then be verified by one qualified under the Constitutions.

It seems to us that this is made crystal clear by the opinion of the Court in the case cited, beginning at page 543 of the cited volume and ending at page 545. For the convenience of the Court, we quote that portion of the opinion, ourselves italicizing for emphasis:

> *"It is a fundamental principle of American jurisprudence that liberty is too sacred to be taken from an individual, unless probable cause, in the language of Chief Justice Marshall, 'upon some good cause certain, supported by oath.' It cannot be constitutionally done upon suspicion, hearsay, opinions or belief. If a warrant of arrest issues upon the belief of the party making the affidavit, it does not rest upon some act certain supported by oath, committed by the party arrested; but it depends alone upon the mental condition of the affiant. This, the Bill of Rights of our Constitution in positive and mandatory language prohibits. The Constitution does not require the verification of the information; but it prohibits the issuance of a warrant of arrest except upon probable cause supported by oath or affirmation.* No form of procedure is established in the Constitution as to how this shall be done in misdemeanors. It is the statute which makes

the information the basis of the issuance of a warrant of arrest and requires the information to be verified by oath or affirmation. If we are to construe this statute strictly, many cases might arise, such, for instance, as cases of circumstantial evidence, in which no witness could be found who had knowledge of all of the facts of the case, and who would be qualified to verify all of the allegations of the information. In such cases it would be impossible to proceed by information. This court has not placed any such construction upon our statute, requiring the verification of an information. Section 5144, Wilson's Rev. & Ann. St. 1903, is as follows: (5144 § 8. The rule of common law that penal statutes are to be strictly construed, has no application to this chapter. This chapter establishes the law of this territory respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to promote its objects, and in furtherance of justice. So we are not only justified, but we are required, to construe the statute with reference to the verifications of information liberally, so that it may accomplish the purpose for which it was enacted, and in furtherance of justice.

"As is hereinbefore shown, that portion of Section 5306, Wilson's Rev. & Ann. St., which provides 'that an information can be verified upon information and belief by the county attorney,' was not adopted and put in force in the State by the schedule of our Constitution for two reasons: (1) Because that portion of said Section was not in force in Oklahoma Territory at the time when Statehood went into effect; it having been twice declared by the Supreme Court of Oklahoma Territory to be unconstitutional and therefore not operative. It was therefore a dead letter upon the statutes of the territory. The schedule of our Constitution only continued and put in force in the State

those statutes which were then in force in Oklahoma Territory. (2) Said portion of Section 5306 is in violation of Section 39, Bunn's Const. The schedule of the Constitution did not and could not put in force in the State any of the statutes of Oklahoma Territory which were in conflict with the Constitution. Therefore the provision that informations may be verified by the county attorney upon information and belief is not and never has been in force in this State.

"Do indictments allege that they are based upon the information and belief of the grand jury? Is it not true that they charge the offense in plain and direct language as a matter of fact? They are founded upon the evidence before the grand jury and are supported by the positive oaths of the grand jurors. Would an indictment stand when no direct evidence had been presented to the grand jury upon which their positive oaths were predicated? Certainly not. It may be said that indictments are not each sworn to by the grand jury, but that the official oath which was administered to the grand jury when they were impaneled applies to all indictments found at the session of the court at which they were impaneled. Our reply is that the statute so directs, in prosecutions by indictment, and also directs that each information exhibited by a county attorney must be verified by the county attorney or the complainant or some other person. By this we are bound.

"The conclusion at which we have arrived is fully set forth by Judge Doyle in *Salter* v. *State* (not yet officially reported), 102 Pac. 724. This court there said: 'The fundamental requirements of the ordinance of the Bill of Rights are: That the facts and circumstances tending to show criminality should be made to appeal to a magistrate himself, by affidavits, complaint, or information positively verified by oath or affirmation and that the magistrate must himself find

in the facts thus shown probable cause and reasonable belief that the defendant has committed an offense before a warrant or arrest shall issue. Section 5306, Wilson's Rev. & Ann. St., requires that: "All informations shall be verified by the oath of the prosecuting attorney, complainant, or some other person, etc." We do not wish, however, to be understood as holding that the information must be sworn to by persons having actual knowledge of the offense charged. See *Ex parte Flowers* (decided at this term, opinion by Baker, Judge, not yet officially reported), 101 Pac. 860. *The evidence of probable cause, however, must be made upon oath or affirmation setting forth the facts constituting the offense of facts and circumstances, showing that a misdemeanor has been committed, and that there is probable cause for believing that the accused is guilty and making it appear to the court that the complaint is based on something more than mere information, belief, or suspicion.'* In the *Flowers* Case (Okla. Cr. App.), 101 Pac. 860, there was an affidavit, alleging in direct terms facts which showed that the defendant had committed a misdemeanor. This affidavit was attached to and incorporated in the information. We held that this fully justified the county attorney in verifying the information, in direct and positive terms, as the statute in force requires shall be done, just as a grand jury charges in direct and positive terms the commission of an offense as a matter of fact and not of belief. *If one witness knows one fact and other witnesses know other facts, which combined are sufficient to satisfy the officer charged with the duty of issuing the warrant of arrest that an offense has been committed, and that the defendant is probably guilty of having committed it, those affidavits may be attached to and incorporated in the information, and the county attorney will then be fully justified in verifying the informa-*

tion, as was done in the Flowers case, and as the law directs.

"If probably cause can be made to appear from one affidavit, why can it not be made to appear from two or more affidavits? In the case of *State* v. *Whisner,* 35 Kan. 27, 10 Pac. 856, it was said: 'The county attorney had the right, for the benefit of the defendant, to file with his information a bill of particulars or any sworn statements, showing what specific offense he intended to charge, when he verified the information.' But notwithstanding the fact that those affidavits are filed with and embodied in the information, our statute requires that the information itself must be verified by the county attorney, the complainant, or some other person. *When the county attorney has a person who can so verify an information, it is not necessary to file such affidavits; but, when no such person can be found, then, in order to give full effect to the prosecution of misdemeanors by information, the above course may be pursued.*

"The statute makes the county attorney the public accuser in cases presented by information, just as the members of the grand jury are the public accusers in cases presented by indictment. *This fact must be remembered when we come to consider the ground upon which the county attorney acts when he verifies an information, not upon his personal knowledge, but upon accompanying affidavits.* No county attorney should hestitate to so act under these circumstances. The statute requires that each information must be signed by the county attorney. So there can be no such thing as a legal information unless it is signed and presented by the county attorney, or some other one authorized by law to do so, as was properly held by Supreme Court in the case of *Evans* v. *Willis,* 97 Pac. 1050, 19 L. R. A. (N. S.) 1059. The statute also provides that each information must be verified by the oath or af-

firmation of the county attorney or the complainant or some other person. *When verified by the county attorney, he is acting in his capacity as public accuser. If he has personal knowledge of the facts stated in the information, he makes the verification upon such personal knowledge. If he has no personal knowledge, then he can incorporate in the information the affidavits of those who have such personal knowledge,* and make the verification in his capacity of public accuser in connection with such affidavits; *but in either condition the verification must be made in positive terms;* just as an offense in an indictment is charged in positive terms. The statute now in force in this State, so requires and we are powerless to change the statute. *For the reasons and upon the authorities hereinbefore quoted in Salter* v. *State, we hold that the motion to set aside the information in this case, because it was not properly verified, should have been sustained."*

And here, we point out that it was squarely held in *Ex parte Talley, supra,* that the proper way to raise this question is by Motion to Quash or set aside the information on this particular ground. In *Ex parte Murray* (Nev.), 157 Pac. 647, the Supreme Court of Nevada held that this question must be raised at the first opportunity and in the Justice of the Peace Court.

Certainly if the United States Constitution requires verification by one having actual knowledge, it is proper and required that an accused be afforded an opportunity to prove that the one who swore to the information was not a proper person to do so because he did not possess the requisite actual knowledge. To hold anything else would be to make a laughingstock of constitutional guarantees.

If the defendant had been permitted to prove, as he offered to do, that Sam Oliver who swore to this information did not possess actual knowledge of the facts, he would have proved that Sam Oliver had no capacity to swear to the information, just as he would have been entitled to prove that the information was sworn to by a crazy man, or sworn to by a legally incompetent person, or by a four-year-old child, as well as that a malicious, tyrannical, arbitrary, unconstitutional act (and series of acts thus set in motion) had illegally deprived him of his liberty.

d. Every court must hear and determine constitutional questions which are properly tendered to it.

It is axiomatic that the constitutional guarantees which are made to litigants include the right to have those guarantees heard and determined by every court where they are properly tendered.

The Supreme Court of the United States in *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 76 L. Ed. 1102, held:

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-Federal grounds, it is the province of this court to inquire whether the decision of the State court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. See *Ward* v. *Love County,* 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 S. Ct. 419; *Enterprise Irrig. Dist.* v. *Farmers Mut.*

Canal Co., 243 U. S. 157, 164, 61 L. ed. 644, 648, 37 S. Ct. 318; *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651, 655, 71 L. ed. 1279, 1289, 47 S. Ct. 669."

The Court in the case last cited also held squarely that a refusal of a court to decide questions of constitutional rights is in itself a denial of those rights, citing:

—*Greene* v. *Louisville & Interurban Ry. Co.*, 244 U. S. 499, 508, 512, *et seq.*, 61 L. Ed. 1280, 1285, 1287, 37 Sup. Ct. 673, Ann. Cas. 1917E, 88;

Smith v. *Cahoon*, 283 U. S. 553, 564, 75 L. Ed. 1264, 1272, 51 Sup. Ct. 582.

Inferior courts, including those of original jurisdiction, have power to pass on the validity of a statute and to declare it unconstitutional in proceedings before them in the course of judicial administration.

See:

—*United States* v. *Neuendorf*, 8 Fed. Supp. 403;

Riccomini v. *United States*, 69 F.2d 480;

Protest of Downing, 164 Okla. 181, 23 P.2d 173;

Pacific Live Stock Co. v. *Ellison Ranching Co.*, 46 Nev. 351, 213 Pac. 700.

e. Where facts are relied on by one alleging unconstitutional deprivation of rights, a hearing must be held and the claimant given an opportunity to prove the unconstitutional action or deprivation.

See:

—*Pierre* v. *Louisiana* (U. S.), 306 U. S. 354;

Franklin v. *South Carolina* (U. S.), 218 U. S. 161, 54 L. Ed. 980;

Martin v. *Texas* (U. S.), 200 U. S. 316, 50 L. Ed. 497;

Hadacheck v. *Sabastian* (U. S.), 239 U. S. 394, 60 L. Ed. 348;

Cook County v. *Chicago Industrial School* (Ill.), 18 U. S. 183;

Vindicator Consolidated Gold Mining Co. v. *Firstbrook* (Colo.), 86 Pac. 313.

f. A litigant is required to assert his constitutional rights at the first opportunity and is entitled to have them ruled upon at the first opportunity.

The universal rule applying to the time for the assertion of constitutional rights was succinctly stated by the Supreme Court of Missouri in *Lohmeyer* v. *St. Louis Cordage Co.*, 113 S.W. 1108, as follows:

> "But it must be taken as settled law that in so grave a matter as a constitutional question it should be lodged in the case at the earliest moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived. *Barber Asphalt Co.* v. *Ridge*, 169 Mo. loc. cit. 387, 68 S. W. 1043, *et seq.*"

The Supreme Court of Oklahoma has, from the earliest incidents, consistently held that constitutional rights not seasonably asserted are waived and thus has obligated every litigant to assert his constitutional rights at the earliest opportunity.

—*State* v. *Frisbie*, 8 Okla. Cr. 406, 127 Pac. 1091;
Daniels v. *State*, 55 Okla. Cr. 298, 29 P.2d 997;
Hughes v. *State*, 83 Okla. Cr. 23, 172 P.2d 439.

The petitioner raised this constitutional question at the earliest opportunity and sought the right of hearing at every opportunity. No such right was afforded and the United States Constitution was thus violated.

—*Morgan* v. *U. S.*, 298 U. S. 468, 80 L. Ed. 1288.

g. A code of procedure which does not contain an adequate procedure for the protection of constitutional rights is not exclusive, and opportunity to assert such rights exists even in the absence of a provision in the code and notwithstanding a contrary provision in the code.

In *Salter* v. *State*, 2 Okla. Cr. 464, 102 Pac. 719, this Court held at page 723:

> "At common law an information might be filed under the English practice against persons charged with misdemeanors, yet no rule was granted in regard to such cases, except upon such evidence as would, uncontradicted, make out an offense beyond a doubt. Arch. Cr. Pl., 76; *Rex* v. *Willett*, 6 T. R. 204; *Rex* v. *Williamson*, 3 B. & Ald. 583; *Rex* v. *Bull*, 1 Wils. 93; *Rex* v. *Hilbers*, 2 Chit. R. 163; *Ex parte Williams*, cited 1 Harr. Dig. 2268; 1 Chit. Cr. L. 856, 857. Said paragraph 15 is little more than the affirmation of the

great constitutional doctrine of the common law. Article 4 of the amendments to the Constitution of the United States is almost identical with said paragraph 15; and Story says that: 'This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property, * * * and its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and in America, upon the subject of general warrants, almost upon the eve of the American Revolution.' 2 Story on the Const., par. 1902. If a warrant, in the first instance, may issue upon mere hearsay or belief, then all the guards of the common law and of the Bill of Rights of our own Constitution to protect the liberty and property of the citizen against the arbitrary power, are swept away. There is no necessity for going so far, and the Constitution warrants no such conclusion. The expressions of the Bill of Rights are very plain and very comprehensive, and cannot be misunderstood."

The Court must look through the form and give opportunity to the litigant to show the substance.

The Court said at page 724:

"In the light of the opinions herein quoted, it must be conceded, as a settled principle of American law, that a complaint or information, verified only on information and belief, is insufficient to authorize the issuance of a warrant of arrest; and a warrant so issued is without authority of law, and is wholly void. And a provision of the Criminal Code of Oklahoma Territory, that purports to authorize county attorneys to verify informations in misdemeanor cases on information and belief is repugnant to the Constitution of Oklahoma, and is in contravention of said Section 30 of the Bill of Rights. The liberties of the people do not

rest upon such uncertain and insecure basis as the belief, opinion, or surmise of a prosecuting officer that a misdemeanor has been committed.

* * * * * * * *

"An information of this sort (the State argued), filed by a prosecuting attorney of this State, requires no verification other than the official oath of the public prosecutor—citing and quoting copiously from case of *State* v. *Guglielmo*, 46 Or. 250, 79 Pac. 577, 80 Pac. 103; also, 22 Cyc. 281. This contention is obviously without merit. The error of the argument is so self- evident as to require only a passing notice. *Counsel overlooks the fact that by the adoption of the Fourth Amendment of the Federal Constitution the procedure by information lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation. U. S.* v. *Tureaud, supra.* The constitutional provision in the Bill of Rights is but a reiteration of this essential safeguard of the liberty and security of the citizen against the arbitrary action of those in authority. *Such pernicious practice may suit the purpose of despotic power, but is alien to the pure atmosphere of political liberty and personal freedom.* The Constitution expressly requires a showing of cause before a warrant shall issue, and the constitutional safeguards for security and liberty cannot in this manner be abrogated or abridged. They must stand as adopted by the people" (Italics ours).

Mr. Justice Rutledge in *Parker* v. *Illinois*, 333 U. S. 571, 92 L. Ed. 86, said:

"Constitutional rights may be nullified quite as readily and completely by hypertechnical procedural obstructions to their effective assertion and maintenance as by outright substantive denial. *Marino* v. *Ragen*, 332 U. S. 561, *ante* 170, 68 S. Ct. 240, concurring opinion at 563."

The events recited early in this brief actually transpired. The record was made just substantially as above recited. If the record now before this Court for any reason omits to show all of these things, the missing portion of the record should be brought before this Court upon and as by way of a Writ of Certiorari, or otherwise, in order that this solemn and sacred right of the petitioner may not be left unsafeguarded.

It is our sincere belief that the conviction of the petitioner must be reversed with directions in accordance with the above.

Proposition II.

The trial court invaded the province of the jury.

In the second proposition the trial court in this case instructed the jury as follows:

> "In this connection, you are instructed that the recorded books referred to in this case as the 'Work Record' and the 'Permanent Tax Sales Record' admitted in evidence and identified as Exhibits No. 6 and 7 are 'books of account' kept in the office of the County Treasurer of Oklahoma County, within the meaning of the foregoing provision of the law."

The Constitution of the State of Oklahoma, Article 2, Sec. 19, is, in part, as follows:

> "The right of trial by jury shall be and remain inviolate * * *."

The Constitution of the State of Oklahoma, Article 2, Section 20, is, in part, as follows:

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial

jury of the county in which the crime shall have been committed; * * *."

It is the contention of the petitioner in this cause that the trial court in effect denied to him the right of a trial by jury by giving the instruction above-mentioned.

When the defendant in the trial court, petitioner here, entered a plea of "not guilty" that plea put in issue every material allegation in the information and controverted each and every material fact to be proven.

The trial court instructed the jury as part as follows:

"2. To this charge, the defendant has entered a plea of not guilty, which casts upon the State the burden of proving the material allegations of the Information to your satisfaction beyond a reasonable doubt before you would be justified in returning a verdict of guilty.

"The Information is simply the charge upon which the defendant is placed upon trial, and sets forth in a formal way the offense of which the defendant is accused, and it is in and of itself no evidence of the defendant's guilt, and you should not allow yourselves to be influenced against the defendant by reason of the filing of such Information.

"The defendant is presumed to be innocent of the crime charged against him, and innocent of each and every material element constituting such offence, and this presumption of innocence continues until such time as his guilt is shown to your satisfaction beyond a reasonable doubt, and if, upon a consideration of all the evidence, facts, and circumstances in the case you entertain a reasonable doubt of the guilt of the defendent of the crime charged against him, you must

give him the benefit of that doubt and return a verdict of not guilty.

"3. The laws of this State provide that: 'Every person who, with intent to defraud, makes any false entry in any book of accounts kept in the office of any County Treasurer in this State by which any demand or obligation, claim, right, or interest either against or in favor of the people of this State, or any county or town, or any individual, is or purports to be discharged, diminished, increased, created, or in any manner affected, is guilty of forgery in the second degree.'

"In this connection, you are instructed that the record books referred to in this case as the 'Work Record' and the 'Permanent Tax Sales Record' admitted in evidence and identified as Exhibits No. 6 and No. 7 are 'books of account' kept in the office of the County Treasurer of Oklahoma County, within the meaning of the foregoing provision of law.

"All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, although not present, are principals and punishable as such.

"Forgery in the second degree is punishable by imprisonment in the state penitentiary for any period of time not exceeding seven years.

"Excepted to by defendant:

/s/ "Fred L. Hoyt,
/s/ "Warren H. Edwards,
Attys. for defendant.

"Exception allowed;
/s/ "Baker H. Melone,
District Judge."

The reason for calling this instruction to the attention of this Court is to show to the Court that under the law of Oklahoma every material allegation must be proven to the satisfaction of the jury. This instruction complained of was excepted to by the petitioner and urged in the Criminal Court of Appeals of the State of Oklahoma as ground for reversal. The petitioner now contends that this act upon the part of the court in giving this instruction and invading the province of the jury denied him due process of law and equal protection of the law as guaranteed to him by the Constitution of the United States of America.

The following cases are cited in support of the petitioner's contention that this act of the court invaded the province of the jury.

In a recent case by the Criminal Court of Appeals of the State of Oklahoma, found in 228 P.2d 204, styled *Potter v. State,* the Court stated in its syllabus in part as follows:

> "3. The jury are bound to take the law from the court, and questions of fact are to be determined by the jury. The charge of the court must not invade the province of the jury, and should not extend beyond a plain statement of the law applicable to the case.
>
> "4. The court has no right in charging the jury to submit any proposition which assumes any particular controverted fact to be proved, which is an expression upon the weight of the evidence or which requires the jury to give more credit to one class of testimony than some other. The jury must be left entirely free to determine all controverted questions of fact."

In the case of *Gray* v. *State*, 122 Pac. 254, decided by the Criminal Court of Appeals in Oklahoma in 1912, the Court said in Syllabus 2 as follows:

> "Where a fact material to the issue, concerning the existence of which there is conflict in the evidence is assumed by the court in an instruction to the jury to be fully established, the province of the jury is invaded, and constitutes prejudicial error."

This holding seems to be universal. The Appeals Court of Missouri in *State* v. *Bayless*, 247 S.W.2d 114, held that:

> "An instruction that assumes a controverted fact is erroneous."

Various courts throughout the country have held to the same effect.

—*Taylor* v. *State*, 55 Ariz. 29, 97 P.2d 927;

—*People* v. *Kinowaki*, 39 Cal. App. 2d 374, 103 P.2d 203.

The Supreme Court of Kentucky held in *Botnick* v. *Corn*, 266 Ky. 419, 99 S.W.2d 188, in substance that "instructions must not assume any fact necessary to convict but every fact essential to conviction for a felony must be submitted to the jury."

In the Louisiana Supreme Court in the case of *State* v. *Thornhill*, 188 La. 762, 178 So. 343, the Court said in substance that "A judge must not charge on the facts, draw any conclusions from facts or assume any fact has been proved."

In the Supreme Court of Mississippi in the case of *Marbe* v. *State*, 195 Miss. 386, 15 So.2d at page 693, the

Court stated in substance that "a charge to a jury must not be framed in such language as to introduce danger that the jury may think therefrom that a disputed or essential fact had been in the opinion of the court established as true."

This is reiterated again in the following:

—*State* v. *Cohen,* 100 S.W.2d 544;

Corn v. *Rankin,* 158 Pa. Super. 1, 43 A.2d 435;

Stanley v. *State,* 142 Tex. Cr. Rep. 495, 154 S. W.2d 856.

In the case of *Milinski et al.* v. *People of the State of New York,* 324 U. S. 401, this Court laid down the rule in Syllabi 4, 5, and 6 as follows:

"4. Where conviction in state court is before federal Supreme Court for review under a claim that a right protected by the Fourteenth Amendment has been denied, the question is not whether the record discloses an infraction of one of the specific provisions of the first eight amendments, but whether defendant was deprived of due process of law by which he was constitutionally entitled to have his guilt determined. U. S. C. A. Const. Amends. 1-8, 14.

"5. Judicial review of the guaranty of due process imposes on the Federal Supreme Court an exercise of judgment upon the whole court of proceeding to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. U. S. C. A. Const. Amend. 14.

"6. The judicial judgment in applying the due process clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a mere personal judgment, and an important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review, but there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty. U. S. C. A. Const. Amend. 14."

In the case of *Rochin* v. *People of California,* 342 U. S. 165, the Court stated:

"2. In the main, the limitations contained in the constitutional provision relating to bills of attainder and *ex post facto* laws and the Thirteenth and Fourteenth Amendments concern not restriction upon the power of the states to define crime, except in the restricted area where federal authority has pre-empted the field, but restrictions upon the manner in which the states may enforce their penal codes. U. S. C. A. Const. Art. 1, Sec. 8, Cl. 18; Sec. 10, Cl. 1; Amends. 13, 14.

"6. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which are so rooted in the traditions and conscience of our people as to be ranked as fundamental or are implicit in the concept of ordered liberty. U. S. C. A. Const. Amend. 14."

In concluding Proposition Two, the petitioner merely wishes to point out that under the Constitution of the United States, he is entitled to have this case reviewed and the entire record brought before this Court upon this

second proposition that the trial court invaded the province of the jury and in fact and in effect denied to this petitioner a trial by jury which was guaranteed to him by the Constitution of the State of Oklahoma and it was denied to him upon a controverted material fact. He was, therefore, denied due process of law and equal protection of the law.

Proposition III.

The petitioner was denied a preliminary hearing.

Under the third proposition the petitioner in this case believes that he was denied a constitutional and statutory right to have a preliminary examination in this case in view of the fact that in the examining trial he was first charged with a conspiracy together with two other persons and in the trial in the District Court he was charged alone and tried alone.

The petitioner believes that this was a variance and deprived him of an examining trial. The authorities have been set out in the opinion and the petitioner will not here burden the Court with further argument and authorities thereon but will merely say that the complaint in the Justice Court is copied in full in these proceednigs and so is the Information in the District Court upon which the petitioner was tried. The authority mentioned in the opinion of the Criminal Court of Appeals and the opinions heretofore cited, we think, show that under a reasonable construction of the two charges that it must be held that the petitioner was denied due process of law by virtue of having been denied an examining trial upon the charge for which he was tried and convicted.

CONCLUSION

The petitioner most respectfully urges to this Court that his Petition for a Writ of Certiorari should be granted for any one or all three of the reasons hereinabove assigned in that he was denied a jury trial on a material part of the charge involved, in that he was denied his constitutional right to have the warrant set aside and the preliminary complaint dismissed and in that there is a fatal variance by the alleged preliminary complaint and the information upon which the petitioner was tried.

Most respectfully submitted,

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Attorney for Petitioner.

January 26, 1953.

Office - Supreme Court, U.S.
FILED
MAR 24 1953
HAROLD B. WILEY, Clerk

In The
Supreme Court of the United States

OCTOBER TERM, 1952

No. 581

W. F. VAHLBERG,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the Criminal Court of Appeals of the State of Oklahoma

---

BRIEF FOR RESPONDENT IN OPPOSITION

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MARCH, 1953.

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INDEX

	PAGE
Opinion Below	1
Authority:—	
Vahlberg v. State of Oklahoma, No. A-11628, Criminal Court of Appeals, Filed October 22, 1952 (Not Officially Reported)	1
Jurisdiction	2
Authority:—	
28 U.S.C., Section 1257 (3)	2
28 U.S.C., Section 2101 (d)	2
Questions Presented	2
Statutes and Constitutional Provisions Involved	3
Statement	3
Authority:—	
Opinion of the Criminal Court of Appeals of October 22, 1952, in this case— No. A-11628 in that Court	4
Title 21, Section 1586, O.S. 1941	4
Argument	7
A. The decision of the Criminal Court of Appeals is clearly correct.	7
Proposition I: The "preliminary information" was not verified within the meaning of the law and as required by the law and was, therefore, insufficient to authorize the issuance of a warrant or to confer jurisdiction upon the Justice Court.	7

PAGE

Authority:—
Boswell v. State, 19 Okl. Cr. 443, 200 P. 256 11
DeGraff v. State, 2 Okl. Cr. 519, 103 P. 538 ..... 8, 11
Logan v. State, 42 Okl. Cr. 1, 274 P. 39 11
Martin v. State, 10 Okl. Cr. 49, 133 P. 1140 11
Mason v. State, 23 Okl. Cr. 111, 212 P. 1028 11
Moss v. State, 4 Okl. Cr. 247, 111 P. 950 9
Munn v. State, 5 Okl. Cr. 245, 114 P. 272 11
Oelke v. State, 10 Okl. Cr. 49, 133 P. 1140 12
State v. Frazier (Mo.), 98 S.W. 2d 707 13
State v. Layton (Mo.), 58 S.W. 2d 454 12
Constitutional Amendments 1 to 13, U.S.C.A. 15
Title 22, Section 494, O.S. 1951 14

B. Petitioner's Propositions Numbered Two and Three, do not raise any question of Federal law which would justify this Court in assuming jurisdiction. 15

Proposition II: The trial court invaded the province of the jury. 15

Proposition III: The petitioner was denied a preliminary hearing. 15

Conclusion 16

In The
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OCTOBER TERM, 1952

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W. F. VAHLBERG,
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VERSUS
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On Petition for Writ of Certiorari to the Criminal Court of Appeals of the State of Oklahoma

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Criminal Court of Appeals of the State of Oklahoma in Case No. A-11,628, W. F. Vahlberg, plaintiff in error, versus the State of Oklahoma, defendant in error, was filed October 22, 1952, and has not, as yet, been officially reported, but the

opinion is fully set out in petitioner's Petition and Brief in Support Thereof on Pages 2 to 36, inclusive.

JURISDICTION

The petitioner attempts to invoke the jurisdiction of this Court under the provisions of 28 U.S.C., Sec. 1257 (3) and Sec. 2101 (d). However, the respondent takes the position that no Federal questions are involved which would justify the Court assuming jurisdiction in this matter.

QUESTIONS PRESENTED

1. The preliminary information or complaint upon which the warrant issued was wholly insufficient for the reason that the affiant had no knowledge whatsoever of the facts set forth in the preliminary information or complaint and only verified the same because the County Attorney of Oklahoma County, State of Oklahoma, told him to sign his name to the complaint.

2. In the trial of the case before the jury, the trial judge took away from the petitioner the right to a trial by jury by instructing the jury that certain exhibits constituted public records required to be kept under the laws of the State of Oklahoma, when in truth and in fact, they were not public records, and this denied the petitioner a right to a trial by jury as guaranteed to him by both the State and Federal Constitutions.

3. The petitioner further shows that he was charged in the preliminary information or complaint with a conspiracy to violate the law and that he was tried in the District Court on a charge of forgery in the second degree upon which he had not had a preliminary examination and had not waived one; and, therefore, this denied to the petitioner due process of law and violated his rights as guaranteed to him under the Fourteenth Amendment to the Constitution of the United States of America.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutes and constitutional provisions, both State and Federal, which the petitioner alleges are involved in this case are set forth on Page 8 in the index of the Petition and Brief in Support Thereof filed by the petitioner.

STATEMENT

The defendant, W. F. Vahlberg, was originally charged with two other individuals in an indictment returned and filed by a grand jury of Oklahoma County, charging them with the crime of forgery in the second degree. Subsequently the District Court after a hearing sustained a Motion to Quash the Indictment and the defendant and the other individuals were discharged. Thereafter, the county attorney commenced a prosecu-

tion against the same three individuals by filing a complaint before a committing magistrate in Oklahoma County. After a lengthy preliminary examination one of the accused was discharged but the defendant and the other accused individual were ordered held to await trial in the District Court. Thereafter the District Court of Oklahoma County overruled a Motion to Quash the information so far as the defendant Vahlberg was concerned, but sustained the Motion as to the other individual and he was discharged. The county attorney then filed an Amended Information charging the defendant Vahlberg alone with the crime of forgery in the second degree by allegedly violating the provisions of Title 21, O.S. 1941, Sec. 1586; a trial was had, the jury returned a verdict of guilty but left the punishment to be fixed by the trial court. Thereafter the defendant was sentenced to serve five years imprisonment in the State penitentiary.

The case was then appealed to the Criminal Court of Appeals of the State of Oklahoma, and docketed as Case No. A-11,628. On October 22, 1952, the Criminal Court of Appeals filed its opinion in the case and, among other things, held,

> "It is, therefore, ordered that the judgment and sentence of the District Court of Oklahoma County be modified from a term of 5 years imprisonment in the penitentiary to a term of 120 days in the penitentiary, and the judgment and sentence as thus modified is affirmed."

The opinion is concurred in by all members of the court.

The petitioner in this case was the County Treasurer of Oklahoma County, Oklahoma, for about 16 years, and was the County Treasurer on the date the alleged crime was committed. He is now an elderly man, approximately 86 years of age and this fact might have caused the Criminal Court of Appeals of the State of Oklahoma to be somewhat lenient with him in the modification and affirmance of the judgment and sentence of the Oklahoma County District Court. The record in this case will disclose that the petitioner in this case, along with certain other tax title dealers, were engaged in the securing of tax titles to properties in Oklahoma County, Oklahoma, by the evasion and violation of the tax laws of the State of Oklahoma. The record will indicate that numerous residents of Oklahoma County lost their property through the manipulations and forgery of public records and various devices and schemes practiced by the petitioner and his associates.

An Oklahoma County grand jury in the fall of 1949, spent several weeks in the investigation of the tax title transactions. Several indictments were returned, including some six or seven against the petitioner herein. Later the indictments were set aside as a result of the faulty empaneling of the grand jury. Thereafter the county attorney filed verified complaints against several of the people indicted, including the petitioner.

At the time the grand jury was in session, Sam C. Oliver, a lawyer, was an evidence man in the County

Attorney's office, but was not an Assistant County Attorney. It is true that Mr. Oliver did not appear in person before the grand jury, as he was not authorized to do so by Oklahoma law. However, in his official capacity as evidence man and investigator for the County Attorney's office, he interrogated numerous witnesses prior to the time they testified before the grand jury and sat in many conferences with the County Attorney, one of the Assistant County Attorneys and an Assistant Attorney General of the State of Oklahoma, in discussing the evidence and the legal propositions involved. He was thoroughly familiar with the various intricacies and ramifications concerned in the involved tax title transactions.

After the grand jury indictments were discharged, Sam C. Oliver, signed and swore to, in positive language, that the statements set forth in the information were true and correct. The information or preliminary complaint was then filed in the Justice of the Peace Court before Howard Boyer, Justice of the Peace.

It is not deemed necessary to go more into detail in this statement, as the record will disclose all the pertinent and material matters involved.

ARGUMENT

A.

The decision of the Criminal Court of Appeals is clearly correct.

PROPOSITION I

The "preliminary information" was not verified within the meaning of the law and as required by the law and was, therefore, insufficient to authorize the issuance of a warrant or to confer jurisdiction upon the Justice Court.

The petitioner contends that Sam C. Oliver, who verified the "preliminary information" in this case, had absolutely no knowledge of facts, but only verified the same because he was told to do so by the County Attorney; that he was not even an Assistant County Attorney, but at that time he held the position of "evidence man and investigator" in the County Attorney's office, and that the filing of the information was predicated merely upon "information and belief" and not upon verification based upon actual knowledge of the offense charged, and that as a result, the ensuing issuance of the warrant of arrest was improper and illegal.

The foregoing contentions of the petitioner do not clearly state the law as it has been interpreted in the light of the facts of this case. These contentions wholly ignore the existing decisions of the Criminal Court of Appeals

of Oklahoma, as well as other jurisdictions both Federal and State. One of the earliest cases on this point (which the petitioner relies upon and quotes from in detail in his Petition and Brief, Pages 75 to 81), is the case of *DeGraff* v. *State*, 2 Okl. Cr. 519, 103 P. 538. The facts of the *DeGraff case* are readily distinguished from the issues herein and in fact have been so distinguished by more recent decisions of the Oklahoma Criminal Court of Appeals.

In the *DeGraff case*, the court held that an information filed in a *court of record* and based *solely on information and belief* did not properly constitute a compliance with constitutional and statutory provisions. We are here concerned, however, with a proceeding before a court *not of record* and with a purely inquisitorial hearing to determine, not the guilt or innocence of the said petitioner, but to determine only upon a preliminary examination whether or not a crime has been committed, and that probable cause exists that the petitioner should be prosecuted on information in a court of record.

There has been filed in this case a preliminary information in proper legal form and *verified as true and positive in unequivocal terms*, and not on mere information and belief. The preliminary information, drawn by the duly acting and qualified County Attorney of Oklahoma County, contains positive statements of all of the essential allegations of a criminal offense against the peace and dignity of the State of Oklahoma. In the case of

Moss v. *State*, 4 Okl. Cr. 247, 111 P. 950, the court decided this question upon a strikingly similar factual situation as in the case at Bar. *It is to be noted that this case is subsequent in time to the DeGraff case. In the Moss case the information was signed by the County Attorney. It developed that said attorney had no personal knowledge of the matters charged*, and defendant filed a Motion to Quash the Information on that ground. The court said:

> "Where the information is verified in positive terms as true, it constitutes a showing of probable cause, even though it may subsequently develop that the affiant had no personal knowledge of the facts alleged. Such verification makes a *prima facie* showing, which is all that is required; and on a motion to quash no issue can be made as to the knowledge or want of knowledge of the person who verified the information. * * * *the sufficiency of the verification must be determined from what is stated therein, and not from evidence aliunde* * * *" (Italics supplied).

Further, in the second paragraph of the syllabus, the court stated:

> "Where an information in legal form is verified as true in positive terms such verification constitutes a sufficient showing of probable cause to authorize the issuance of a warrant of arrest and to put the defendant on trial; *and on a motion to quash the information, no issue can be made as to the knowledge or want of knowledge of the facts charged on the part of the person who verified the information, nor can the information be set aside on the ground that the person who verified it had no personal knowledge of the facts alleged*" (Italics supplied).

It is to be noted that the *Motion to Quash filed by defendant* in the *Moss case* was made in a *court of record;* and even under these circumstances the court said:

> "To say that the probable cause contemplated in Section 7, Art. 2, of our Bill of Rights, must be shown by the oath or affirmation of an eye witness to the perpetration of an offense, or one who has actual knowledge, from personal observance of the commission of the crime, would preclude the people from legally prosecuting a large proportion of the crimes usually committed, and prevent the enforcement of the criminal law in all cases where resort must be had to circumstantial evidence, since the oath or affirmation required by this section of our Bill of Rights is an essential prerequisite to an arrest, whether the preliminary examination is to be had, or the warrant is to issue on an information. Nor are we prepared to say that * * * it is within the power of the accused to attack * * * the truth of any of its essential statements. *Certainly no authority for such a practice is found in the statute, and, in our opinion, ought not to be tolerated * * * and we hold that, where the verification of an information is in due form, no issue can be made as to the knowledge or want of knowledge of the person who verified it for the purpose of quashing or setting aside the information, either before the trial or during its progress*" (Italics supplied).

In reference to the verification of the information in the *Moss case*, the court further stated:

> "In this case the information was signed by the County Attorney who was the informant. It was verified by *an enforcement attorney* to whom the statute gives all the powers of county attorneys in the enforcement of the laws, and who assisted in the prosecution in this case * * * both representing the State."

Thus, the petitioner is without authority of law to raise any issue relative to the verification of the preliminary information filed against him. Said preliminary information was signed by the County Attorney and verified as true in positive terms clearly apparent on its face, and not on mere information and belief.

The rule as stated has been followed in other decisions of this State and in the courts of other States. See, for example, *Munn* v. *State*, 5 Okl. Cr. 245, 114 P. 272; *Martin* v. *State*, 10 Okl. Cr. 49, 133 P. 1140; *Boswell* v. *State*, 19 Okl. Cr. 443, 200 P. 256, wherein the court cited with approval *Moss* v. *State*. The courts are not as strict in applying technical rules of pleading in the case of a preliminary examination as in the case of an information filed in a court of record. In *Mason* v. *State*, 23 Okl. Cr. 111, 212 P. 1028, the court said:

> "Technical rules of pleading need not be adhered to in a preliminary complaint to the same extent as may be required in an information filed in the trial court."

And in the *DeGraff case*, the court said:

> "So we are not only justified but we are required to construe the statute (relating to verification by oath or affirmation) liberally, so that it may accomplish the purpose for which it was enacted, and in furtherance of justice."

In the case of *Logan* v. *State*, 42 Okl. Cr. 1, 274 P. 39, the court distinguished the ruling made in the case of *DeGraff* v. *State*, *supra*, where the affidavit was

made on mere information and belief. In this case the court in discussing the affidavit (the term affidavit here being used to designate the verification given to the complaint) stated:

> "In this case the affidavit to the complaint is positive in its terms, and was not made on information and belief, as argued by the defendant. This affidavit was sufficient to authorize the issuance of the warrant of arrest, *and was sufficient to preclude an inquiry into the question of fact and to the personal knowledge of the affiant as to the facts thus positively sworn to*" (Italics supplied).

Further in the case of *Oelke* v. *State*, 10 Okl. Cr. 49, 133 P. 1140, the court said:

> "Where an information charging a misdemeanor is sworn to positively by the county attorney, it is sufficient to authorize a warrant for the arrest of the defendant, and is sufficient to authorize the county court to put the defendant upon his trial, *even though the county attorney had no personal knowledge of the commission of the offense charged.*
>
> "The purpose of a verified complaint for a warrant for arrest is to invoke the judicial power of the magistrate, and when filed it is the duty of the magistrate to determine judicially if there is probable cause for believing the evidence of things stated. In so determining the magistrate exercises a judicial function: whether or not he errs in his conclusion or whether or not the affidavit upon which the warrant is obtained is true is not an issue in the trial of the case" (Italics supplied).

In *State* v. *Layton* (Mo., 1933), 58 S.W. 2d 454, defendant assigned as error the fact that the complaint by which a prosecution was instituted in justice court

was not based on first hand knowledge of the facts attending the alleged offense. The court said:

> "But the complaint is not expressed to be verified on information and belief: it contains a positive recital of the facts unquestionably sworn to. We know of no reason why this is not entirely sufficient."

Further in *State* v. *Frazier* (Mo., 1936), 98 S.W. 2d 707, the court stated:

> "The assignment is without merit * * * the verified complaint * * * does not constitute the formal charge for a prosecution. It merely launches the preliminary examination held to determine whether the accused shall be bound over or held for trial and the statute does not require that kind of complaint to be made by a person having first hand knowledge."

The Justice of the Peace Court is not a court of record and has always been considered a purely investigating court to establish the commission of the crime and the essential probable cause. There is nothing in the inherent nature of a preliminary hearing that does not inure primarily to the benefit and advantage of the defendant. In the *Moss case, supra*, the identical questions of law which the petitioner herein endeavors to assert were ruled upon, and the court emphatically stated that *the Bills of Rights of the Federal and State Constitutions were not violated* by the overruling of the said objections, and that the sufficiency of the verification must be determined from what is stated in positive terms and not from evidence *aliunde*.

It is interesting to note that the petitioner in his Brief failed to cite a single citation where his objection had been sustained in a court not of record.

Title 22, O.S. 1951, Sec. 494, reads as follows:

> "To enable the defendant to make proof of the matter set up as grounds for setting aside the indictment, or information, the defendant may file his application *before any court of record* in the county, setting out and alleging that he is being proceeded against in a certain court, naming it, and setting out a copy of his motion and alleging, all under oath, that he is acting in good faith, and praying for an order to examine witnesses in support therof. The court shall thereupon issue subpoenas to compel any or all witnesses desired to appear before him at the time named, and shall compel the witnesses to testify fully in regard to the matter and reduce the examination to writing, and certify to the same, and it may be used to support the motion. The mover shall pay the costs of the proceeding. He shall notify the county attorney at least two clear days before he proceeds, of the time and place of taking such testimony, and the county attorney may be present and cross-examine the witnesses and if need be the case in the district court must be adjourned for that purpose."

The Justice Court is not a court of record wherein an information may be set aside as the above statute provides, nor is there any statutory authority upon which the petitioner can predicate his objection in a court not of record.

The petitioner in attempting to raise a Federal question under his first proposition seems to rely mainly on the fourth, fifth and ninth amendments to the Federal

Constitution, but apparently has overlooked the proposition that the first ten amendments to the United States Constitution are not a limitation on the powers of the States. The cases on this proposition are too numerous to mention, and may be found under the heading of Constitutional Amendments 1 to 13, United States Code Annotated.

In view of the above and foregoing, respondent submits that no Federal question is involved under petitioner's Proposition No. 1, which would merit the United States Supreme Court taking jurisdiction of this matter, and in the alternative should the Court be of the opinion that a constitutional question is involved, it is submitted that the decision of the Oklahoma Criminal Court of Appeals is so clearly correct that it is not likely that the United States Supreme Court would arrive at a different opinion.

B.

Petitioner's Propositions Numbered Two and Three, do not raise any question of Federal law which would justify this Court in assuming jurisdiction.

PROPOSITION II

The trial court invaded the province of the jury.

PROPOSITION III

The petitioner was denied a preliminary hearing.

It is to observed that the petitioner in his Petition for Writ of Certiorari and Brief in Support Thereof, devotes only six pages of his Brief to the consideration of these two propositions, and does not cite any cases in point under Proposition Two, and does not cite any cases at all under Proposition Three, but merely argues that they come under the due process clause of the Fourteenth Amendment to the Federal Constitution.

Both of these propositions were carefully considered by the Criminal Court of Appeals of Oklahoma in its opinion in this case and the conclusions reached therein are clearly correct. In our opinion petitioner's Propositions Two and Three do not involve any question of Federal law, which would authorize this Court to assume jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MAC Q. WILLIAMSON,
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OWEN J. WATTS,
Assistant Attorney General for the State of Oklahoma,
Oklahoma, City, Oklahoma,
Counsel for Respondent.

MARCH, 1953.

Office - Supreme Court, U.
FILED
APR 20 1953
HAROLD B. WILLEY, Cler

No. 581

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

W. F. VAHLBERG,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

PETITION FOR REHEARING ON WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF

JOHN B. OGDEN,
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April, 1953.

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INDEX

PAGE

SUBJECT INDEX

Petition for Rehearing on Writ of Certiorari to the Criminal Court of Appeals of the State of Oklahoma 1

Brief in Support of Above Petition 4

Conclusion 9

AUTHORITIES CITED

CASES:

Crawford, Ex parte, 4 Okla. Cr. XII, 112 Pac. 41 7

Degraff v. State, 2 Okla. Cr. 519, 103 Pac. 538 7

Simmons, Ex parte, 4 Okla. Cr. XIV, 112 Pac. 41 7

State v. Brown, 24 Okla. 433, 103 Pac. 762 6

Talley, Ex parte, 4 Okla. Cr. 398, 112 Pac. 36 7

CONSTITUTION OF OKLAHOMA:

Article II, Section 6 6

Article II, Section 17 7

STATUTES:

Title 22, O. S. A., Article 171 7

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PETITION FOR REHEARING ON WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

Comes now the above-named petitioner and shows to this Court that on the 6th day of April, 1953, this Court denied the petitioner's Writ of Certiorari in this case and declined to assume jurisdiction. This petitioner now shows to this Court that he believes a rehearing should be granted and the Writ should be issued for the following, reasons, namely:

(1) The question presented in this case is whether or or not a warrant should issue under the laws and Constitution of the State of Oklahoma upon a false affidavit.

(2) Whether or not the defendant should be precluded from showing the falsity of the verification on the criminal complaint.

The Criminal Court of Appeals of the State of Oklahoma held that the defendant could not present a motion to quash the complaint and warrant issued thereon even though the defendant could prove and offered to prove in this case that the complaining witness, who verified the complaint, had no knowledge whatsoever concerning the alleged offense and signed the complaint merely because he was directed to do so by the County Attorney or prosecuting officer.

This petitioner now respectfully shows to this Court that to deny him the right to present his evidence showing that the affiant had no knowledge whatsoever of the facts alleged in the complaint was a denial of his rights under both the Constitution and Laws of the State of Oklahoma and the Constitution of the United States.

For brevity's sake the petitioner will not cite the cases heretofore set forth and will not urge the last two grounds set forth in the petition on file herein but will present only the question as to the false verification and the refusal of the Court to permit him to show its falsity.

The petitioner therefore most respectfully requests this Court to grant a rehearing and reconsider the question thus presented and to issue the warrant as prayed for.

Respectfully submitted,

JOHN B. OGDEN,
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Oklahoma City, Oklahoma,
Attorney for Petitioner.

BRIEF IN SUPPORT OF ABOVE PETITION

In order for the Court to fully comprehend the only question presented in this petition for a reconsideration and rehearing it is deemed advisable to briefly state the facts.

The petitioner was County Treasurer of Oklahoma County, Oklahoma. A complaint was filed in Justice Court charging him with forgery in the second degree and the opinion of the Criminal Court of Appeals stated that it was possible, if the facts alleged were true, for the County to have lost approximately $3.00 on account of the petitioner's paying the taxes and taking a certificate to a certain piece of property in Oklahoma County, Oklahoma, and that this constituted a technical violation of the law.

Under the Oklahoma law there are only two ways by which a person can be charged with a felony:

(1) By indictment by a grand jury.

(2) By a preliminary complaint being filed in the Justice Court, duly verified, and a warrant being issued and examining trial had before the Justice of the Peace and the defendant then being bound over by the Justice of the Peace to the District Court.

After these proceedings are had then the County Attorney is authorized under the law to file an information in District Court upon which the defendant is then tried before a jury.

The primary question now to be considered is whether a defendant can question by proper proceedings the fact that the verification on the complaint in the Justice Court

was made by a person without any knowledge or even information concerning the facts therein set forth.

In the case at bar the defendant in the Justice Court filed proper pleadings by a motion to set aside the warrant and dismiss the complaint for the reason above stated. In the District Court he filed a motion to quash the information on the same case and in each instance the Court held that the defendant could not question the verification in any way whatsoever and that it must be assumed to be true; and, whether the affiant had knowledge or did not have knowledge, whether he swore falsely or honestly it all amounts in law to the same and the opinion of the Criminal Court of Appeals in this case upheld such rulings and announces that to be the law in Oklahoma.

It would seem to the petitioner that it is outright folly to say that if the affiant to a criminal complaint swears a falsehood that this is better, more forceful, and authorizes a trial and the issuance of a warrant when and if the affiant swore truthfully, a warrant could not issue and a trial could not be held.

In this case before this Court now the facts are that the affiant, Sam Oliver, had no knowledge whatsoever concerning the matters alleged in the complaint and only signed the complaint and verified it because he was told to so do by the County Attorney. The petitioner offered to prove this in both the Justice Court and the District Court but the Court refused him this legal and constitutional right and in effect closed the door of the courthouse to the petitioner. In this case the affiant, Sam Oliver, did not testify in the trial thereof, which, of course, is further evidence

of the fact that he knew nothing about the case but yet the Criminal Court of Appeals, the Trial Court, and the Justice Court refused to quash the warrant and the complaint when it was shown, or offered to show, and for the purpose of this record it must be admitted that the affiant had no knowledge at all and swore falsely.

The petitioner most earnestly insists that he has been denied his constitutional and statutory rights under both the State Constitution of Oklahoma, the United States Constitution, and the laws of Oklahoma. We now quote the statute and constitutional provisions of Oklahoma relative to this matter:

Section 6 of Article II of the State Constitution reads:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

In the case of *State* v. *Brown*, 24 Okla. 433, 103 Pac. 762 (1909), the Criminal Court of Appeals held that this section is self-executing.

It is the contention of the petitioner here that the holding of the Cirminal Court of Appeals in this case has denied to him the right to present in court that fact that the affiant had no knowledge of the matters set forth in the complaint. Therefore, the courts of justice were not open to the petitioner and he was denied his constitutional right and denied due process of law.

Title 22, Article 171, Oklahoma Statutes Annotated, is as follows:

> "COMPLAINT—Issuance of Warrant of Arrest.
>
> "When a complaint, verified by oath or affirmation, is laid before a magistrate, of the commission of a public offense, he must, if satisfied there from that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, issue a warrant of arrest."

Section 17 of Article II of the State Constitution reads:

> "No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint."

It will thus be seen that both the Constitution and the Statutes of Oklahoma require that the complaint must be duly verified.

In the case of *Degraff* v. *State*, 2 Okla. Cr. 519, 103 Pac. 538, the Criminal Court of Appeals held that a warrant of arrest could not be issued on suspicion, heresay, or belief, but only on some fact certain supported by oath or affirmation. In *Ex parte Talley*, 4 Okla. Cr. 398, 112 Pac. 36; and *Ex parte Simmons*, 4 Okla. Cr. XIV, 112 Pac. 41; and *Ex parte Crawford*, 4 Okla. Cr. XII, 112 Pac. 41, the Criminal Court of Appeals held in substance that an information charging a misdemeanor must be verified in positive terms and an unverified information or one verified on

information and belief were equally defective. If this be true then why would a complaint verified without any knowledge not likewise be void and the warrant issued thereon void?

Assume for the purpose of presenting the question here urged that the affiant had made a true verification and said that "I, Sam Oliver, have no knowledge whatever concerning the facts set forth in the above complaint but signed the same because requested to do so by the County Attorney of Oklahoma County." Would this be sufficient? Of course the answer is NO. The defendant offered to prove this in court and the courts, beginning with the Justice Court and ending with the Criminal Court of Appeals, closed his mouth and refused to let him make the proof and advised him that it was immaterial under the law of Oklahoma and the Constitution of Oklahoma whether the affiant had any knowledge or not.

This, we say, could not be the correct holding for the reason that it would completely nullify and make meaningless the laws and Constitution of the State of Oklahoma.

Assume for the purpose of argument that the Court would say that the word "12 jurors" actually means "2 jurors." Would this Court permit a person to be denied a trial upon such frivolity and foolish holding. Of course this Court would then hold that the petitioner, if such a case, as was here presented, had been denied due process of law.

We think that it is equally true that in this case the petitioner has been denied due process of law because the Constitution and laws of Oklahoma require a duly verified complaint and it could not be reasonably said that the com-

plaint verified by a person without any knowledge whatsoever conformed to the law.

Therefore, this petitioner most earnestly requests the Court to reconsider his petition and to reread the authorities cited in his original brief on the question hereinabove raised and upon a reconsideration thereof to grant a rehearing in this cause and render an opinion herein in accordance with the prayer of the petition.

Most respectfully submitted,

JOHN B. OGDEN,
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Attorney for Petitioner.

April, 1953.